REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL CASE NO. E020 OF 2021

REPUBLIC.....STATE

VERSUS

MICHAEL KOSKEI.....APPELLANT

(Being an appeal from the ruling of Hon. C. A. Kutwa

SPM Iten, in Cr. Case No. 148 of 2017 made on 30/3/2021).

JUDGMENT

1. The appellant being aggrieved by the decision of Hon. Charles Kutwa (Senior Principal Magistrate) made on 30/3/2021 in Iten Senior Principal Magistrate's Court Criminal Case No. 148 of 2017 filed this appeal against the same on the grounds that:-

i. The honourable Magistrate erred in law and fact in failing to recuse himself;

ii. The circumstances of the case are such that the honourable magistrate ought to have recused himself in the interest of justice for justice to be seen to be done;

iii. The honourable magistrate's refusal to recuse himself will defeat the ends of justice.

2. The decision the subject matter of this appeal is the application by the appellant before the trial court dated 15/1/2021. In that application the appellant sought the recusal of the honourable trial magistrate from the case on the following grounds.

a) The honourable trial magistrate was openly hostile to the appellant.

b) The honourable trial magistrate had openly made unfavourable remarks on the appellant.

c) The honourable trial magistrate has openly expressed dissatisfaction over the matter being referred back to it after revision.

d) The honourable trial magistrate is unlikely to do justice as it is biased against the appellant.

e) Justice is about perception and justice must not only be done but seen to be done.

f) The complainant and an advocate have threatened the appellant with imprisonment upon conviction in this matter.

3. The appeal is opposed by the State. Both parties filed submissions which I have carefully considered. I have also carefully considered the impugned ruling of the honourable learned magistrate delivered on 30/3/2021 and which is the subject of the appeal.

4. In my view, the only issue I raise for determination is whether or not this appeal has merit. To do that it is necessary that I review the proceedings before the trial court to establish the existence of any of the alleged grounds for the appeal.

BACKGROUND

5. The appellant was jointly charged with another in Iten Senior Principal Magistrate's Court Criminal Case Number 148 of 2017 as the first accused. He took plea on 13th March, 2017, and pleaded not guilty to the charges and the matter was set down for hearing. The appellant instructed Mr. Momanyi Advocate to act for him in the matter. On 30th January, 2018 PW1 and PW2 testified. PW3 testified on 19th June, 2018. On 25th October, 2018 PW4, PW5 and PW6 testified.

6. On that day, Mr. Momanyi was absent and the appellant cross-examined the witnesses himself. On 19th March, 2019 Mr. Momanyi filed an application to recall PW4, PW5 and PW6 to testify afresh on grounds that on the date when they gave their evidence, Mr. Momanyi was absent as he was engaged in another matter at the Environment and Land Court. The court allowed the application and directed that PW4, PW5 and PW6 be recalled for further cross-examination. Shortly thereafter, Honourable H. M. Nyaberi who was handling the matter proceeded on transfer and Honourable C.A. Kutwa took over the matter on 6th August, 2019. Directions were taken to the effect that the matter proceeds from where it had reached.

7. On 28th August, 2019 PW5 and PW6 were recalled for purposes of cross-examination. PW7 also testified on the same date. On 4th November, 2019 PW4 was recalled for further cross-examination. PW8 also testified and the prosecution closed its case. On 21st November, 2019, ruling was delivered and the appellant and his co-accused were placed on their defence. On 17th December, 2019 the matter came up for defense hearing and the appellant and his co-accused informed the court that their advocate was on the way to court. However, at 11.00 a.m the appellant and his co-accused gave their sworn evidence in the absence of their advocate, Mr. Momanyi. The matter was given a mention date for 7th January, 2020, for closing submissions. On that day Mr. Momanyi successfully applied for more time to file submissions. The mention for compliance was then set for 14th January, 2020. However, on that day Mr. Kipchumba who was holding brief for Mr. Momanyi made an application to re-open the defense case and call witnesses. This application was declined and the matter was slated for Judgment on 3rd February, 2020. On that day, the appellant informed the court that his co-accused was admitted in hospital and so judgment was deferred. On 18th February, 2020 judgment was deferred again as the appellant's co-accused was absent and consequently a warrant of arrest was issued.

8. On 25th February, 2020 Mr. Momanyi asked the court to lift the warrant of arrest against the appellant's co-accused and informed the court that he had filed a Revision application number 2 of 2020 at Eldoret High Court. The court stayed proceedings pending the outcome of the revision. The High Court ordered that the defense case be re-opened and the matter proceeded for defense hearing on 7th January, 2021. The appellant testified but his co-accused was stood down as the defense asked to be allowed to produce documents. On 13th January, 2021 the matter came up for further defense hearing but the same was adjourned as Mr. Momanyi was absent. The matter was then slated for defense hearing on 18th January, 2021 but on that day the appellant through his counsel brought an application seeking recusal of the trial magistrate.

9. In his submissions filed herein on 9/11/2021 the appellant states that;

> **i. The honourable magistrate has become extremely hostile to the appellant and his co-accused**
>
> **ii. The honourable magistrate has on several occasions made negative remarks/comments or utterance about the appellant and his advocate.**
>
> **iii. The honourable magistrate has on several occasions fixed the matter for hearing without bothering to know if the date is convenient to the appellants and the appellants advocate.**
>
> **iv. The fixing of the dates does not take into account the fact that the appellant is a civil servant stationed in Nairobi and his advocate is based in Eldoret.**
>
> **v. The honourable court decided to have the accused conduct their defence in utter disregard of their right to representation.**
>
> **vi. The honourable magistrate is extremely bitter after the revision where the High Court found the hearing of the matter conducted in the appellant's advocate absence untenable and ordered that the exercise be conducted afresh in the advocate's presence.**

10. The appellant also cited Regulation 21 part 11 of judicial Service (Code of Conduct and Ethics) Regulation 2020 which states 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 constitution 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 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, a disqualification will be inevitable".**

11. On their part, the Respondent in opposition submitted that no reasons have been advanced to prove any of the grounds stated in the application for recusal before the trial court. Ms. Okok, learned counsel for respondent cited 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 profde, 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.***

12. This authority is clear, and I accept it that a party applying for recusal of a judicial officer must do so upon clear grounds. In my view, the allegations made by the appellant were vague, unsubstantiated and intended to undermine the independence of the court. It is also a fact that the record of the proceedings before the court does not show any elements or indication of bias. In fact, in my view the learned trial magistrate was extremely accommodative to both accused persons in the matter, and even more so, the learned trial magistrate went out of his way to accommodate Mr. Momanyi the learned counsel for the appellant. It is also noted that the application for recusal came at the tail end of the proceedings, when in fact, the appellant had completed giving his evidence, and the co-accused was already on his feet.

13. In the circumstances, the inference that this Court makes is that the application for recusal of the learned trial magistrate is solely motivated by desire to delay the trial, if not to altogather scuttle it. This cannot be entertained by a court of law.

14. The appellant's allegation that the learned trial magistrate was hostile to him; that he made unfavourable remarks on the appellants; that he expressed dissatisfaction over the matter being referred back to him after revision; that he is biased; that he had solicited a bribe through another counsel; or, that he was determined to jail the appellant for five years – are mere allegations. I have looked at the proceedings and I find no inference to any of the above issues. It is arguable, though, that some of those issues may not appear on the record, and that they may have been verbalized during proceedings. However, if that were to be the case then nothing stopped the appellant or his advocates to make instant objection before the trial court. Furthermore, some of these allegations, if true, cannot be entertained even by the prosecution. In any event, the law is that anybody who allege must prove. There is simply no proof of any of those wild allegations against the honourable learned magistrate to warrant his recusal.

15. And just in case there is still some doubt in this matter; good and acceptable practice the world over, and indeed the emerging practice in Kenya, is that where a party seeks the recusal of a Judge from a matter, the party would ask for the mention of the matter in the chambers, where the party would outlay his or her grievances, or suspicion and in which forum the Judge would be aware of possible application for his or her refusal. If indeed it is true that the honourable learned magistrate uttered some of the things alleged; and if the utterings were in court, nothing stopped the applicant from instantly objecting and publicly by his action creating a record for the same in the proceedings. All parties including the respondent, would be aware of such instant objection even if the trial court were to fail to record it. However, if the alleged utterings were made away from the court proceedings, and the appellant became aware of them, the appellant ought to have brought the knowledge of the same before the honourable trial magistrate for his comments. In this matter, it is clear that none of the two scenarios took place. In fact, record shows that on 13th January 2021, the matter came up for further defence hearing but the same was adjourned as Mr. Momanyi was absent. A new hearing date being 18/1/2021 was given. However, on that day, instead of proceeding with the hearing the appellant fished out the application for the recusal of the learned trial magistrate. This was an action is utmost bad faith.

16. I have read the impugned ruling by the Honourable learned trial magistrate delivered on 30/3/2021. The ruling is well reasoned and speaks for itself and is adequately supported by competent judicial authority. I have absolutely no reason to interfere with that ruling.

17. In the premises the appeal here is dismissed with costs to the respondent.

E. OGOLA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED AT ELDORET THIS 26TH DAY OF JANUARY, 2022.