Koech v Republic (Criminal Appeal E021 of 2021)
[2022] KEHC 16574 (KLR) (16 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16574 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E021 OF 2021

RN NYAKUNDI, J

DECEMBER 16, 2022

BETWEEN

JAMES KOECH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Arising from Iten Criminal Case No 148 of 2017 dated and delivered on March 30, 2021.)

RULING

Coram: Hon. Justice R. Nyakundi

Mr Mugun for the State

Mr Anassi Momanyi & Co. Advocates for the Appellant/Applicant

1. The appellant on April 1, 2021 approached this court through a petition of appeal dated March 30, 2021 on the following grounds;

    a) The honourable magistrate erred in law and fact in failing to recuse himself.

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

    c) The honourable magistrate's refusal to recuse himself will defeat the ends of justice

2. The basis of that petition of appeal was a ruling delivered by the trial court in Iten Criminal case No 148 of 2017 dated and delivered on March 30, 2021 where the accused persons had filed an application for recusal of the trial court which application was dismissed.

3. I have perused the trial court file in a bid to establish the basis of instituting the application for recusal and it is my finding that ,the appellant was jointly charged with another with the offence of malicious

damage to property contrary to section 339(1) of the *Penal Code* where he pleaded not guilty and the suit was then set down for hearing. The Prosecution called a total of eight witnesses on diverse dates in support of its case after the close of the Prosecution's case, the appellant and his co accused were placed on their defence. The matter was then slated for defence hearing on December 17, 2019. From the proceedings, it appears the rain started beating this matter on the said date. From the record, when the matter was called out, the Appellant and his co- accused informed the court that their counsel Mr Momanyi was on his way. Later, at around 11am, it appears that the accused persons gave their evidence and a date for confirmation of filing of submissions was fixed for January 7, 2020. On the said date, counsel Barmao who was holding brief for Counsel Momanyi requested for more time to file the said submissions and a further mention date of January 14, 2020 was given. On the January 14, 2020, Mr Kipchumba who was holding brief for Mr Momanyi sought for time to re-open the case but the court declined that request. A date for judgment was then fixed and on the said date, that is February 3, 2020, the 1st accused was sick hence judgment was deferred to February 18, 2020 where the appellant was absent as a result of which warrant of arrest were issued against him. A mention date was then fixed for February 25, 2020, when Mr Momanyi counsel for the accused persons prayed for the warrant of arrest to be lifted on the grounds that the appellant was unwell. Mr Momanyi then informed the trial court that he had filed a revision Application No 2 of 2020 before the Eldoret High Court. From the record, the warrant of arrest was lifted and the courts proceedings were stayed pending the revision.

4. It would appear that the case was re-opened by orders of the High Court but on January 18, 2021 when the matter was slated for further defence hearing, the application for recusal of the trial magistrate was filed.

5. This appeal was canvassed by way of written submissions. The appellant's submissions were filed on March 22, 2022.

Determination

6. In what circumstances should an appeal court quash a judicial exercise of discretion by a judicial functionary in a case where allegations of bias and partiality have been raised by one of the litigants? That is the central question to this appeal.

7. This court draws its jurisdiction from the principles in the case of *Okeno v Republic* (1972) EA 32 was it was stated inter-alia thus

> "Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholau* (1955) 22 EACA 270)."

8. From the records the contestation between the appellant and the trial court is on recusal or disqualification of the trial magistrate seized of jurisdiction of the criminal proceedings to step down to leave room for an equally competent magistrate to steer the trial. By implication the appellant is persuading this court that the trial magistrate has breached his oath of office of impartiality and to administer justice without respect to persons and to faithfully discharge his duties with a sense of

justice. This is what US Supreme Court had in mind in *Bush v Gore* 61 MD L REV 606, 610 (2002) when it observed

> "That judicial decision –making must appear to be free of bias is premised on the widely held belief that public confidence is essential to upholding the legitimacy of the judiciary."

9. The key word quite often used by litigants or their respective counsels to reasonably question the impartiality of the trial judge or magistrate is that of "might". Professor Abramson, *Appearance of Impropriety: Deciding when a Judge's Impartiality "Might reasonably be Questioned*," 14 Geo J Legal Ethics 55, 58 (2000) as defined might as expressing especially a shade of doubt of a lesser degree of possibility. The court in *Liteky v United States*, 510, 554-55(1994) went further to expound as follows

> "The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a necessary condition for "bias or prejudice" recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice. Nor is it a sufficient condition for" bias or prejudice" recusal, since some opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will not suffice.... Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible."

10. I have analysed the trial court proceedings, the petition of appeal and particularly the submissions on the appeal and I find that the issue for my determination is whether the appeal merited.

11. In the case of *Kinyatti v Republic* (1984) eKLR, the court when dealing with a similar issue as the instant case had this to say;

> " When the application is made by the parties, the principal consideration by the Judge or the judicial officer is whether there is reasonable apprehension in the mind of the applicant that he/she may not have a fair and impartial trial before that Judge or the judicial officer."

12. In the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2013] eKLR the Supreme Court of Kenya gave the policy rationale and objective of the rule of recusal in these words:

> .....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.

13. In the South African case of *President of the Republic of South Africa v The South African Rigby Football Union & others* CCT 16/98, the court had this to say;

> " At the very outset we wish to acknowledge that a litigant and her or his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is counsel's duty to advance the grounds without fear. On the part of the judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be

unduly sensitive and ought not to regard an application for his (or her) recusal as a personal affront."

The basic interests of justice require that the appellate court in examining the record and factual determination made by the trial court including findings of credibility retain some scope to review the complaint to determine the serious and sensitive issues raised on an allegation of bias.

14. The Appellant has made very grave allegations that the trial magistrate has been hostile to them and has on several occasions made negative remarks about the Appellant and his advocate. It has also been submitted that the honourable magistrate has been fixing matters for hearing without bothering to know if the date is convenient to the Appellants and their advocate. I have taken time to analyse the proceedings of the lower court and I am convinced that the appellant was more than accommodated in his trial. In "*Barbados Turf Club v Eugene Melynk* [2011] CCJ 14 (AJ), a case from the Caribbean Court of Justice, in which it was stated that:

> "Where, as in this case, the Respondent contends that the decision of the tribunal was tainted by apparent bias, the appropriate test 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': In re Medicaments and Related Classes of Goods (No. 29) [2001] 1 WLR 700 at pp. 726-727]." Similarly "The Commentary on the Bangalore Principles of Judicial Conduct, published by the United Nations Office on Drugs and Crime, the perception of impartiality is captured in this way at paragraph 52:
>
> > " Impartiality is the fundamental quality required of a judge and the core attribute of the judiciary. Impartiality must exist both as a matter of fact and as a matter of reasonable perception. If partiality is reasonably perceived, that perception is likely to leave a sense of grievance and of injustice, thereby destroying confidence in the judicial system. The perception of impartiality is measured by the standard of a reasonable observer. The perception that a judge is not impartial may arise in a number of ways, for instance through a perceived conflict of interest, the judge's behaviour on the bench or his or her associations and activities outside the court."

15. Upon taking into consideration all the issues in this matter holistically, I find that the Appellant has not laid a basis of any perception or a reasonable basis or foundation for having suspicion or a perception that the magistrate was biased as a result of which he would have been impartial in the final determination. In the case of *Kaplana H Rawal v Judicial Service Commission & 2 others* [2016] eKLR eKLR the Court of Appeal held that:-

> " It cannot be gainsaid that the Applicant bears the duty to establish the facts upon which the inference is to be drawn that a fair minded and informed observer will conclude that the Judge is biased. It is not enough to just make a bare allegations. Reasonable grounds must be presented from which an inference of bias may be drawn."

16. It therefore follows that for the Court to recuse itself from hearing a matter on grounds of bias or presumed bias, it was upon the Appellant to demonstrate that a fair minded or informed observer in the streets of Iten would have concluded that the trial magistrate was biased. The focus will be the form and standard of the reasonable person as a yardstick in determining the circumstances on the foreseeability of bias and partiality on the part of the trial court. Justice by an independent tribunal under Article 50(1) of the *Constitution* must not only be done but be seen to be done. For the sake of completeness depended on the facts and the nature of the issues decided I find no real possibility

that the learned trial magistrate was biased. It is trite that a session judge should not recuse himself or herself, unless he or she is either conflicted by the proceedings genuinely rendering him or her not to give a fair hearing to the claimants in the case. The test is that of a reasonable man that a fair minded and informed observer of the proceedings will conclude that there is or was a real possibility that justice is unlikely to be secured by any of the parties before that forum. The threshold in such matters is clearly outlined in the case of *Triodos Bank NV v Dobbs* [2001] EWCA Civ 468; [2006] CP Rep 1

> "It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If the judges were to recuse themselves whenever a litigant – whether it be a represented litigant or a litigant in person – criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticised – whether that criticism was justified or not. That would apply, not only to the individual judge, but to all judges in this court; if the criticism is indeed that there is no judge of this court who can give Mr Dobbs a fair hearing because he is criticising the system generally, Mr Dobbs' appeal could never be heard."

17. Further in *R (Toovey and Gwenlan) v The Law Society* [2002] EWHC 391 (Admin) at paragraph 80:

> "Applications for the court to recuse itself have become increasingly fashionable of late, regrettably often with no factual or legal justification. It may be tempting for a client to want to recuse the Court when he perceives his case if failing, but that is no justification for counsel to make the application ... it is for counsel to satisfy himself that there are reasonable grounds for making such an application."

18. The sanctity of any trial lies in securing the protocols under article 50 of the *Constitution* on observance by all parties the due process clauses provided therein. This then is the appropriate region and domain that a question of recusal must be traceable to express any language of bias or conflict against a session judge for that matter to be read in such a way to include magistrates and chairmen of tribunals. All the violations alleged by the applicant are yet to qualify as grounds for recusal of the presiding magistrate in Criminal No 148 of 2017.

19. The legal test having been applied to the memorandum of appeal and found wanting the correct approach is to dismiss the appeal in its entirety.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 16TH DAY OF DECEMBER, 2022.

.....

R. NYAKUNDI

JUDGE

In the presence of:

Matekwa for Momanyi for the appellant

Mr Mugun for the state