REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL DIVISION OF THE HIGH COURT

CRIMINAL REVISION NO. 524 OF 2020

DIRECTOR OF PUBLIC PROSECUTION.....APPLICANT

VERSUS

ASSA KIBAGENDI NYAKUNDI.....RESPONDENT

RULING

1. The subject of this ruling is a notice of motion application dated 18th June 2020, filed by the Respondent; Assa Kibagendi Nyakundi (herein "the Respondent") under the provisions of; Article 50 and 165 (4) of the Constitution of Kenya 2010, (herein "the Constitution). It is supported by the grounds thereto and an affidavit of the even date, sworn by; Dr John Khaminwa an Advocate of the High Court of Kenya, who has conduct of the matter on behalf of the Respondent and a further affidavit by the Respondent.

2. The Respondent is seeking for orders that; the matter be referred to the Honourable Chief Justice, to appoint a Judge or Judges outside the Criminal Division of Nairobi, for hearing and determination and that a certificate be issued that a substantial question of law arises touching on the constitutionality of a provision in a statute.

3. The Respondent avers that, by a ruling delivered on 20th May 2020, the Learned Magistrate, Honourable T. B. Nyagena declined to allow the application by the Director of Public Prosecutor seeking to discontinue and/or terminate criminal proceedings against the Respondent, in the Chief Magistrate's Court in case number 704 of 2019*: Republic vs Assa Kibagendi Nyakundi*.

4. That being dissatisfied with the decision, the Director of Public Prosecutions (herein "the Applicant") filed an application for; revision dated 29th May 2020, seeking that, the subject ruling be stayed, and this court calls for and examines the record of the proceedings in the trial court file, as to its legality, correctness or propriety.

5. However, the Respondent argues that, after the ruling was delivered the Applicant was given fourteen (14) days of appeal, but no appeal has been filed against the ruling. Further, the letter to the court seeking for revision was not copied to the Respondent's lawyers and/or the lawyers representing the victim's family.

6. Similarly, upon receipt of the letter by the Applicant seeking for revision, the Honourable Lady Justice Lessit, the Presiding Judge of the Criminal Division of the High Court, Nairobi, directed that, the matter be heard and determined by; Honourable Lady Justice Grace Ngenye, on 16th June 2020, without making corresponding order that; the firm of; Khaminwa and Khaminwa Advocates, and the firm representing the victim's family be served. Additionally, that order makes reference to an affidavit and yet no such affidavit was forwarded to the Respondent's Learned Counsel; Mr H. Ndubi.

7. The Respondent further avers that, the defence had adverse information against; Honouable Lady Justice Lessit, and sought audience in privacy to address the same but, that opportunity was withdrawn before the defence could address the court, as the Judge stated that; she was not hearing new matters and effectively recused herself. The matter was left at that.

8. However, the Judge later issued orders staying the proceedings in criminal case number 704 of 2019, at Kiambu Chief Magistrate's Court, although subsequently those orders were later discharged. The Respondent thus argues that, the order that, the matter be heard and determined in the absence of the Respondent; creates a "clear perception of bias".

9. Further, Maxwell Otieno, investigating Officer has sworn affidavit which indicates that, there has been communication between the Criminal Division of the High Court; Nairobi and the Prosecution and/or Investigators. Similarly, due to the conduct of the State Prosecutor Ms Catherine Mwaniki, before lady justice Grace Ngenye on 19th June 2019, it would be inappropriate for the Honourable Lady Justice Ngenye to hear and determine the purported application in the letter dated 2nd June 2020, as the application concerning "falsehoods" uttered by prosecutor Catherine Mwaniki in June 2019, remains unprosecuted.

10. Additionally, a distinct perception was created that; the Criminal Division of the High Court; Nairobi was performing "acts of intimidation against the proceedings in Kiambu Chief Magistrate's Court". Additionally, the Applicant has preferred concurrent proceedings against the Respondent; in the Chief Magistrate's criminal case numbers; 704 of 2019, and Kiambu High Court criminal cases; 32 of 2019, and 35 of 2019.

11. That, as soon as case number 35 of 2019, was terminated, objection was raised over the same but that objection has not been heard for a period of over a year. Further, the Respondent has failed to inform the court that, an application for revision had previously been filed and refused in criminal case number 35 of 2019.

12. The Respondent submitted that, the Constitution of Kenya, 2010, does not make reference to a creature called "*nolle prosequi*" and if there is any such provision, then it is null and void. That, Section 82 of the Criminal Procedure Code is perverse the Constitution of Kenya, 2010, and a substantial question arises in accordance with Article 165(4) of the Constitution of Kenya, 2010.

13. Finally, the Respondent averred that, he practices law in Nairobi, and there is reasonable apprehension based on displayed conduct that, he may not be treated fairly in the High Court Criminal Division.

14. However, the application was opposed vide a replying affidavit dated 22nd June 2020, sworn by; Ms Catherine Mwaniki, a Senior Assistant Director of Public Prosecutions. She joined issues with the Respondent on the fact that; by a ruling dated 20th May 2020, the trial court declined to terminate the charges of manslaughter against the Respondent.

15. That, being aggrieved, the Applicant filed a revision application at Kiambu High Court vide Criminal Revision number 306 of 2020. However, Honourable Lady Justice C. Meoli recused herself and the matter was transferred to; High Court Criminal Division at Nairobi.

16. The Applicant rebutted the averments that, the Respondent was not aware of the hearing of the matter and stated that, upon orders being made, that the matter be heard by; Hon. Lady Justice G. Ngenye, on 11th June 2020, the order was served upon the Learned Counsel Haron Ndubi; for service upon Dr John Khaminwa. It is argued that, the subject notice of motion application herein dated 18th June 2020; was filed to merely delay the main matter and defeat justice.

17. Further, Article 157 of the Constitution gives the Applicant the power to discontinue or terminate criminal proceedings vide a *nolle prosequi*. Similarly, pursuant to a letter by the Learned defence Counsel Dr John Khaminwa, to the Honourable the Chief Justice, it is clear that, he expected the parties would accept the decision of the Chief Magistrate's Court. As such, the subject application is intended to secure a favourable order that would effectively bring the criminal charges to an early end.

18. The Applicant also averred that, although the Learned Counsel Dr John Khaminwa "vaguely" contends that, the matter raises a serious constitutional issue, the application does not state what substantial issue is, that require the empanelment of a bench by the Honourable Chief Justice.

19. The Applicant further argued that, the attack on Honourable Lady Justice Lessit, as the Presiding Judge of the High Court Criminal Division, by the Learned Counsel Dr J. Khaminwa in the letter to the Chief Justice, is most "obnoxious" and made without any factual foundation. That, it is calculated to scandalize the Honourable Judge and entire Criminal Division of the High Court in Nairobi.

20. Further, the letter was calculated to influence the mind of the Honourable the Chief Justice on this matter or cause the Honourable Chief Justice to act on the matter when all the available lawful/legal avenues have not been exhausted by any aggrieved party. As such, it does not surprise that, the Respondent seeks to have a panel of judges, empaneled or constituted.

21. The Applicant argued that, the application for transfer of the case outside the Criminal Division in Nairobi fits the description of "forum shopping" as the Respondent does not state any reason why the matter cannot be heard by the Honourable Court or any other Judge in the Criminal Division other than the Lady Justice Lessit, whom the Respondent has identified and targeted without any basis for vilification. Further, the transfer sought is meant to delay the criminal matter as the empanelment of a bench is time consuming due to the shortage of Judges.

22. Additionally, the Respondent has filed several applications in the High Court in Nairobi which are yet to be determined and is guilty of non-disclosure on the latest ruling by Honourable Justice Ogembo, that any issue of *nolle prosequi* should be raised before the High Court Case No.35 of 2019; *Republic vs Assa Kibangendi Nyakundi.* That, criminal case No. 35 of 2019, has never been withdrawn.

23. Similarly, the Respondent does not demonstrate throughout his affidavit, the alleged misconduct on the part of the Applicant, and how the misconduct renders the revision application fit for the empanelment of a three (3) Judge bench.

24. The Applicant denied the alleged averments that, Investigating Officer; IP Maxwell Otieno's deposed in an affidavit that, there was communication between the High Court Criminal Division in Nairobi, Prosecution and Investigating Officers.

25. The application was disposed of by filing submissions which were then highlighted by the respective counsels. In a nutshell the Respondent submitted that, the Applicant having failed to raise all issues before the lower court, cannot therefore, use the revision application as a forum for repair of cases. That, indeed the Learned Trial Magistrate rightly found the Applicant's Learned Counsel's actions a "circus".

26. The Learned Counsel; Dr Khaminwa submitted that, he has practiced in court for more than fifty (50) years and therefore he is reluctant to raise any adverse matters against Judges unless absolutely necessary. That, in order to avoid a perception of bias, this matter ought to be taken before a Judge who has no previous interaction with the "circus" that, these proceedings have turned out to be. He argued that, the

request for a transfer of the matter does not amount to; shopping for a favourable forum like the prosecution alleges.

27. The Learned Counsel; Dr Khaminwa and H. Ndubi submitted rally that, a *nolle prosequi* is a creature of common law which was codified under Section 82 of the Criminal Procedure Code. Therefore, it raises substantial points of law that, can only be heard by a bench of three Judges. That, section 82 is unconstitutional as it relates to; the authority the Attorney General had under the repealed Constitution of Kenya. That, then is the question to be determined, on public interest.

28. Further it is important to determine whether Section 82 of the Criminal Justice System contravenes Article 157 (6) and (8) of the Constitution of Kenya, and whether a *nolle prosequi* exists under the subject Constitution.

29. That, indeed the affidavit by the Learned Counsel Catherine Mwaniki has raised the same. Further, the bench will determine what the Applicant is referring to as new evidence. The Respondent submitted that, it is not the duty of this court to determine whether the question is substantial or not but to determine whether the bench should be constituted.

30. However, the Respondent submitted that, under Article 165 (4) of the Constitution the High Court has the power and jurisdiction to determine, whether the matter raises a substantial question of law and to suggest otherwise is a misnomer. Further, Article 157 (6) of the Constitution in no way contradicts Section 82 of the Criminal Procedure Code, and in fact reading both confirms that the power of *nolle prosequi* exists.

31. The Applicant further submitted that, the issues raised concerning the constitutional and statutory mandate of; the Director of Public Prosecutions to enter the *nolle prosequi* are hardly novel nor raise a substantial issue. The case of; *J Harrison Kinyanjui vs Attorney General (2012) Eklr*, was cited where the court held that; "a substantive question" means more than a question that is merely novelty or complex. It must take into account the provisions of the constitution as a whole and need to dispense justice without delay, particularly a specific fact situation.

32. Similarly, in the case of: *County Government of Meru vs Ethics and Anti-Corruption Commission (2014) eKLR;* the court held that, in addition, to the aforesaid, each case must be treated on its own merits by the Judge certifying the matter as raising a substantial question. Reference was made to the case of; *Okiya Omtatah Okoiti and Another, Vs Ann Waiguru Cabinet Secretary Devolution and Planning& 3 others (2017) eKLR*, which laid down the principles that guide the certification under Article 163 (4) (b) of the Constitution. The Applicant therefore argued that, the application herein does not meet these principles for certification of the matter and/or empanelment of a bench.

33. On the issue of recusal of the court, the Applicant submitted that, an application for recusal is not a sword to be wielded to steal a match and deny a chanced to the other party. The Respondent cited the case of; *Phillip K. Tunoi & another vs Judicial Service commission & Another (2016) eKLR*, which dealt with the test of bias and argued that, the Respondent is seeking to choose which court or Judge should hear his matter, in violation of the oath of office by each Judicial officer to administer justice to all people impartially.

34. Further reference was made to the case of; *South Africa & 2 others vs South African Rugby Football Union & three others (1999)* which held *inter alia* that; the correct approach to the application for recusal of members of the court is objective and the onus of establishing it rests upon the party applying for recusal.

35. Finally, the Applicant referred to the case of; *Uhuru Highway Development Limited vs Central Bank of Kenya Appeal number 36 of 1996*, was cited to argue that, judges should not accede to suggestions of bias.

36. At the conclusion of the arguments advanced by the parties, I find that, there two issues to consider; whether the court should allow the transfer of this matter from the Criminal Division of the High Court, Nairobi and/or whether to certify the matter for empanelment of the bench as prayed.

37. Be that as it were, before I deal with these issues, I wish to make the following observation that, the parties have in their address to the court, delved into the merits of the revision application. However, to avoid any embarrassment and/or prejudice that may be caused to the Judge(s) or bench that, may subsequently hear the matter, I shall not consider the subject arguments and/or delve into the merit thereof.

38. To revert back, I shall first deal with the issue of recusal. The term "recusal", meaning withdrawal, has its roots in the English Roman Catholic concept of "recusant", a term which was used to label people who refused to attend services of the Church of England. The advent of constitutionalism and principles of; rule of law necessitated development of law of recusal of judges as well. This is because, as Sir Stephen Sedley, a former Judge of the Court of Appeal of England and Wales, puts it-

> "*Independence and impartiality are the twin pillars without which justice cannot stand, and the purpose of recusal is to underpin them".*

39. Similarly, the law relating to judicial recusal is based on the fundamental proposition that, a court should be fair and impartial, as the public confidence in the institution is supreme. In Justice Hammond's seminal book "Judicial Recusal", the law of recusal is classified into two parts: automatic disqualification and bias.

40. In the instant case, the Respondent has cited bias as a ground for recusal. In that regard, in the case of; *AWG Group Ltd v. Morrison* (2006) 1 WLR 1163, the Court of Appeal summarized the principle as follows:

> "*The test for apparent bias now settled by a line of recent decisions of this court and of the House of Lords is that, having ascertained all the circumstances bearing on the suggestion that the judge was (or would be) biased, the court must ask 'whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility … that the*

tribunal was biased". (emphasis added)

41. In the same vein, in the case of; ***Uhuru Highway Development Ltd. vs. Central Bank of Kenya & 2 Others Civil Appeal No. 36 of 1996,*** the Court of Appeal stated that:

> ***"Except where a person acting in a judicial capacity had a pecuniary interest in the outcome of the proceedings, when the Court would assume bias and automatically disqualify him from adjudication, the test applied in all cases of apparent bias was whether having regard to the relevant circumstances, there was a real danger of bias on the relevant member of the tribunal in question, in the sense that he might unfairly regard or unfairly regarded with favour or disfavour the case of a party to issue under consideration by him: the real test is in terms of real danger rather than real likelihood to ensure that the Court is thinking in terms of possibility rather than probability of bias... Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duties to sit and do not, by acceding too readily to the suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they will have their cases tried by someone thought to be more likely to decide the case in their favour... Although most litigants would much prefer that they be allowed to shop around for judges that would hear their cases, that is a luxury which is not yet available under our law to litigants."***

42. Further, Regulation 21 (d), of t**he Judicial Service (Code of Conduct and Ethics) Regulations 2020** dated 26th May 2020. provides as follows:

> *"(1) A judge may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the judge—*
>
> *(d) has actual bias or prejudice concerning a party;*

43. Finally, in the case of; *Simonson –vs- General Motors Corporation U.S.D.C. p.425 R. Supp, 574, 578 (1978),* (quoted in the Supreme Court of Kenya, ***Gladys Boss Shollei v Judicial Service Commission & another [2018] Eklr),*** the United States District Court, Eastern District of Pennsylvania, stated as follows:

> *"Recusal and reassignment is not a matter to be lightly undertaken by a district judge, While, in proper cases, we have a duty to recuse ourselves, in cases such as the one before us, we have concomitant obligation not to recuse ourselves; absent valid reasons for recusal, there remains what has been termed a "duty to sit" . . ."*

44. From the legal authorities cited above, recusal entails the act of a judge being removed or voluntarily stepping aside from a legal case due to conflict of interest or other good reason. It does not involve recusal of an entire constituent of judges and/or judges of an entire division of the Court as prayed for herein. Indeed, the requirement of an independent and impartial judicial officer embraces both subjective and objective tests and in that case, each case must be considered on its own merit and/or facts, and on the grounds and/or allegation against an individual judge.

45. The Respondent has cited two particular judges who have handled the subject matter and conceded that, one of these judges has effectively recused herself. The other judge has since been transferred from the criminal division. There are four other Judges in the division who have not handled this matter and indeed no reasons have been adduced as why they cannot hear this matter.

46. Further, the allegation by the Respondent that, he practices in the court and may not have a fair hearing is not sufficient to disqualify all the judges in the division from hearing the matter. The upshot is that, I find no merit in the prayer for transfer of the matter from the Criminal Division of the High Court and decline to allow it.

47. I shall now consider the issue of; empanelment of the bench. The jurisdiction and/or power of the court to refer any matter for empanelment of bench is provided under; Article 165(3) and (4) of the constitution of Kenya, 2010, which states that:

> *"(3) Subject to clause (5), the High Court shall have; -*
>
> *(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;*
>
> *(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—*
>
> *(i) The question whether any law is inconsistent with or in contravention of this Constitution;*
> *(ii) The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*
> *(iii) Any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*
> *(iv) A question relating to conflict of laws under Article 191; and*
>
> *(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice".*

48. Form these provisions, what needs to be determined is a whether there exists a substantial question of law. In the case of; ***Chunilal vs. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314***, the court held that: -

"A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial."

48. In ***Santosh Hazari vs. Purushottam Tiwari*** *(2001) 3 SCC 179* it was held that:

"To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first, a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis." (emphasis added)

49. The question that arises is whether; there is evidence of a substantial question of law herein. To answer this question, I have held regard to the materials placed before the court namely; the revision application, the notice of motion and the preliminary objection in response thereto, the replying affidavit to the motion and the submissions by the parties.

50. However, before I deal with that issue, it suffices to note that, the substratum of the matter herein is a "revision application". Thus there is no a petition per se herein. Be that as it were, questions touching on matters of the constitution have arisen, and thus invoking the jurisdiction of the court's under; Articles 165 (3) and (4) of the Constitution of Kenya, 2010.

51. The invocation has been raised by the Applicant in the revision application by stating that; the revision application is brought "pursuant to; Articles; 2,3, 10, 26,27, 45, 47, 50, 157, 159 and 165 of the Constitution of Kenya, 2010". The Respondent has also, alleged in the notice of motion, the infringement of; Articles 50 and similarly cited Article 165 (4) of the Constitution of Kenya, 2010.

52. Having established that the jurisdiction of the court has been properly invoked, I find that, the issue to consider is whether based on the aforementioned material, the parameters of Article 165 (4) of the Constitution have been met.

53. In that regard, I find that a question has arisen herein as to whether; Section 82 of the Criminal Procedure Code is inconsistent or contravention with Article 157 (6) (c) of the Constitution. Further, whether Section 8 of the Magistrate's Court's Act, 2015, is inconsistent with or in contravention of the provisions of; Article 157 (6) (c) of the Constitution. These two questions fall under; Article 165 (3) (d) (i) of the Constitution.

54. Similarly, from the materials placed before the court, both parties are questioning the manner in which the DPP has exercised or exercises its discretion under; Article 157 (6) (c) and (11) of the Constitution. In my considered, that issue falls under Article 165 (3) (d) (ii) of the Constitution of Kenya, 2010.

55. It therefore follows that; the subject matter herein qualifies under Article 165 (4) of the Constitution for certification. The question that arise is, what then is the threshold under those provision. In the case of; *of Okiya Omtatah Okoiti & another vs Anne Waiguru – Cabinet Secretary Devolution and Planning & 3 others [2017] eKLR* the Court of Appeal held that:

"In Hermanus Phillipus Steyn vs Glovanni Gnechi – Ruscone (2013) eKLR, the Supreme Court of Kenya pronounced governing principles for purposes of certification under Article 163(4)(b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt with modification the following principles:

(i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;

(ii) Applicant must show that there a state of uncertainty in law;

(iii) The matter to be certified must fall within the terms of Article 165(3) (b) or (d) of the Constitution;

(iv) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought"

56. I find that, from the aforesaid, all the above guiding principles have been met save for the last one, in that, the Respondent did not, in the notice of motion application, identify specifically and/or concisely substantial questions or questions of law that arise herein. However, notwithstanding the same, the questions were articulated in the submissions and/or highlighting thereof. I therefore, find that, pursuant to the provisions of; Article 3 and 159 (2) (d) of the Constitution of Kenya, 2010, the failure to specify the substantive question of law cannot defeat the substantive interest of justice which I hereby uphold.

57. Be that as it were, it suffices to note that, indeed the court in the case of; *National Super Alliance(NASA) Kenya Vs Independent Electoral and Boundaries Commission (2017) e KLR,* held that: -

> *"---the decision whether or not to empanel a bench of more than one Judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant constitutional and statutory provisions and relevant precedents.*
>
> *In order to be "substantial" it must be such that there may be some doubt or difference of opinion or there is room for difference of opinion. If the law is well-settled, by the Supreme Court, the mere application of it to particular facts would not constitute a substantial question of law.*

58. I find that, the questions raised herein, as aforesaid, have not been tested and or settled by the Supreme Court of Kenya. Further, the provisions of; Article 165(4) of the Constitution gives the court discretionary powers based on the circumstances of the case to certify the matter for empanelment.

59. The upshot is that, I find and hold that, the matter herein has met the threshold of establishing a substantial question of law. In fact, the decision of the bench will set, guidelines for the subordinate court, while exercise the powers granted to it under Article 157 (6) (c) of the Constitution.

60. I further find that, in addition to the question referred to herein; the empanelment bench will have to consider inter alia, other issues raised regarding; institution of several cases concurrently against the Respondent and the validity and/or competence of the revision application, on the argument that, the Applicant should have filed an appeal against the ruling of the trial Court.

61. Finally, I find that, it is not in vain and/or without valid reasons when the Applicant in the revision application raises the issue of delay in hearing this matter. However, I am aware that, the empanelment of a bench is being dealt with expeditiously based on the recent bench(s) constituted and once empaneled. I am inclined to believe a bench will be instituted expeditiously. I also believe that once instituted, this matter will be heard on priority basis to enable progress thereof.

It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 22ND DAY OF APRIL, 2021.

GRACE L. NZIOKA

JUDGE

In the presence of;

Mr Muteti & Ms Gichui for the Applicant

Dr Khaminwa for the Respondent

Applicant in person

Edwin court assistant