



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS CRIMINAL DIVISION

HIGH COURT CRIMINAL REVISION NO. E364 OF 2021

GEORGE MERITEI WARUINGI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. By a notice of motion application dated; 29th September 2021, the applicant is seeking for orders as here below indicated: -

a) That, the court file in the Chief Magistrate's Court at Milimani Nairobi Case No. 45 of 2015, be forthwith transmitted to the High Court of Kenya at Milimani Nairobi for revision;

b) That, the Honourable court be pleased to issue revisionary orders to revise and set aside the orders of the learned Honourable Trial Magistrate, Hon. Kennedy Cheruiyot dismissing the application for recusal in the ruling delivered on 28th September 2021 and substitute it with an order that the subject Criminal Case No. 48 of 2015 be transferred to any other Magistrate for hearing and determination.

c) That the honourable court be pleased to issue a revisionary order setting aside the finding and ruling of Hon. Kennedy Cheruiyot to the effect that the accused has a case to answer.

2. The application is premised on the provision of; sections 362, 364, 369 of the Criminal Procedure Code, (cap 75), Laws of Kenya, Article 50 (1) (2) (c), of the Constitution of Kenya, 2012, and all enabling provisions of law. It is supported by the grounds thereto and an affidavit of the even date sworn by the applicant.

3. He avers that, he is the accused in; Criminal case No. 48 of 2015, at the Chief Magistrate's Court at Milimani, Nairobi which is being heard by; Honourable K. Cheruiyot, Principal Magistrate. That, following the decision of the court that, the applicant has a case to answer, the trial court placed him on his defence.

4. However, he was disturbed by the ruling as the evidence on record did not support such a position. Furthermore, the ruling was short, devoid of any detailed analysis of the submissions of defence counsel, leaving a lot of questions and doubt in mind as to how the court arrived to the conclusion that, he had a case to answer.

5. That, pursuant thereto, he instructed his counsel to file an application dated; 21st January, 2020, for the recusal of the learned trial Magistrate on the account of; bias and gross misconduct and gave reasons and details thereof. The application was heard and the ruling delivered on; 28th September, 2021, whereupon, the same was dismissed. Further, the trial court immediately scheduled the matter for defence hearing on; 5th October, 2021, barely a week after the said ruling.

6. It is averred that, by the trial court ignoring and/or dismissing the plea for time to prepare for the defence and/or the recuse himself from the matter, is plainly wrong, inappropriate, unreasonable, illegal and unconstitutional and demonstrates the personal interest he has in the matter.

7. Therefore, as a result of declining to recuse himself and given the nature of solicitation of bribery allegations made by the applicant against the lower court, it is inconceivable that, the court would proceed to hear the defence impartially and render a just judgment as the mind of the court is highly likely to be clouded by the "personal attack".

8. As such, it is in the interest of justice, that the matter be transferred to another court forthwith as there is a likelihood of apparent bias against the accused.

9. Upon filing of the application, the court directed that, the application be served for inter-parties hearing. The Respondent was given timelines within which to file a response to the application and the submission thereto. At the time of writing the ruling, I note that there is no response filed by the Respondent but there is submission filed.

10. The application was disposed of by filing of submissions. The applicant filed submissions dated 9th November 2021. In nutshell, it is submitted that, in an application for recusal, the Judge or Judicial Officer is obliged to consider not only actual bias but perception. Therefore, with all the serious allegations levelled against the court as detailed out in the two affidavits sworn by the applicant in support of the recusal application, and in view of the fact that, the allegations therein, were not rebutted by the learned trial Magistrate and the complainants counsel, then the perception of bias arose.

11. That, the learned trial Magistrate should have exercised the powers given to him under; section 39 of the Criminal Procedure Code and issued an order for investigation of any person suspected of committing a crime than treat the allegations casually. The applicant relied on the cases of; *Attorney General of Kenya vs Professor Anyang Nyongó & 10 Others EACJ Application No. 5 of 2007* and *Supreme Court of Canada R vs S.C.R. D (1977), 3 SCR*, to argue that, the allegations against the court were based on reasonable apprehension and not mere suspicion. Further, the saying “justice must not just be done but must be seen to be done”, requires that, any perception of bias be taken seriously.

12. The applicant has in its submissions evaluated the evidence of the prosecution case and in particular the evidence of one, *Rahim Virani the director of Arrow Cars*, the complainant in the lower court and submitted that, the finding that, he had a case to answer, is plainly wrong, improper, unreasonable and illegal, given the evidence and law applicable especially section 316 A, presumably of the Penal Code.

13. Be that, as it were, the Respondents submit that, the application made for recusal of the learned trial Magistrate is an avenue being used by the applicant to avoid the expeditious disposal of the matter. That, the court refused to recuse itself as the issue of bias was not well demonstrated. Further, the trial court delivered the ruling and noted that, the court was not party to the outcome of court settlement and that the applicant was forum shopping for a court.

14. I have considered the application and I find that, prayers (1) and (2) are spent in that, the lower court file has already been availed. The only prayers that are alive are prayers (3) and (4). In a nutshell, prayer (3) seeks for revision of the orders in the ruling where the learned trial Magistrate declined to recuse himself from the matter. The applicant seeks that, the matter be transferred to another court and/or Magistrate for hearing and determination.

15. In that regard, I have considered the application dated; 29th September, 2021, seeking for the recusal of the learned trial Magistrate, and note that, the applicant did not provide any other document relating to the application apart from the application filed and the affidavit in support thereof. All the documents; the subject recusal application and all documents relating thereto, were provided by the prosecution, which apparently seems to have been annexed to the submissions.

16. Be that as it were, upon considering the record of the lower court, I have taken note of; application for recusal of the learned trial Magistrate dated; 21st January, 2020, the grounds thereto and the affidavit sworn by the applicant in support thereof. Having gone through the same, I find that, the allegations against the learned Magistrate were inter alia that, the learned trial Magistrate had engaged in an inappropriate “communication” with the complainant’s counsel touching on the case. The details therefore were that the counsel had solicited for Kshs 2. 000.000 on behalf of the learned trial Magistrate, so that a judgment would be given in favour of the applicant.

17. Upon considering the application, the learned trial Magistrate, stated as follows in the ruling: -

“The accused person has been put on his defence in this matter. He sought for my recusal on the grounds that the counsel for the complainant approached the defence with a proposal to settle the matter”

18. The learned trial Magistrate further states as follows: -

“The issue that emerges are whether the allegation of bias is factual and if so whether there is a likelihood of bias.

I have considered the explanation by the advocate for the complainant that he indeed approached the defence with a view to settlement of a civil suit between the parties over the same subject matter.

That does not involve the court or the trial magistrate. As such, the allegations that there would be a likelihood of bias is unfounded.”

19. The learned trial Magistrate then concluded that, the applicant was forum shopping and as there was no likelihood of bias against any party in the proceedings, he refused to recuse himself and dismissed the application.

20. Having considered the materials before the trial court and the resultant ruling, I note that, the trial court did not at any time address itself to the serious accusation levelled against the learned trial Magistrate of “inappropriate communication” and/or solicitation of a bribe. These were serious allegations touching on the integrity of the learned trial Magistrate and the court and called for consideration.

21. However, in view of the fact that, there was no tangible evidence placed before the court on the issue of solicitation of the bribe, in my

considered opinion, the option left for the court was to direct investigations into the allegation as the case continued, if the court was not inclined to recuse itself as the investigations continued. The failure to order for investigations and/or address the same, would cast aspirations, or create perception in the mind of any right thinking member of the society.

22. Be that as it were, if the court herein were to order for recusal of the learned trial Magistrate without proof of the allegations, and allow it, it will equally amount to casting aspiration on the court. In my considered opinion, in the given circumstances, the recusal will be based on the conscience of the court. Even then, I have been reliably informed that, the learned trial Magistrate has been transferred and the matter should settle, if another court is hearing it.

23. As regards the prayer of the applicant to review the trial court's finding on whether he has a case to answer, I will quickly dispose of the same by holding that, this is a live matter in the trial court. To consider the prayer sought, this court must evaluate the evidence on record of the trial court, thus delving into the merits thereof. That will definitely prejudice the case in the lower court.

24. I therefore decline to accept that invitation and direct that, the matter should proceed before the lower court to conclusion. The applicant still has room to move the court after the conclusion of the matter and will not suffer any prejudice if the orders sought are not granted.

25. The upshot of the matter is that; the application is not allowed. The lower court file be returned to the trial court; it is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 29TH DAY OF NOVEMBER 2021.

GRACE L NZIOKA

JUDGE

IN THE PRESENCE OF:

KIRAGU FOR THE RESPONDENT

APPLICANT PRESENT IN PERSON

EDWIN OMBUNA – COURT ASSISTANT