REPUBLIC OF KENYA IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 81 OF 2010

GEOFFREY MWANGI MURIUKI.......1ST ACCUSED

VERSUS

REPUBLIC..PROSECUTOR

RULING

1. In a judgment dated 22nd June, 2018, Geoffrey Mwangi Muriuki ("Applicant") was convicted of the offence of murder contrary to section 203 as read together with section 204 of the Penal Code. The trial was conducted by Lady Justice Maureen Odero who prepared the judgment. I read the judgment on her behalf as she had been transferred out of the station by the time the judgment was ready for delivery.

2. It also fell upon me to conduct a sentence hearing and pass sentence. In a Sentence Ruling delivered on 18/10/2018, I sentenced the Applicant to ten years imprisonment in a considered Ruling.

3. The Applicant is dissatisfied with both the conviction and the sentence. He has timeously appealed to the Court of Appeal. In addition, the Applicant has filed a Notice of Motion Application to this Court seeking for bail pending appeal. On the day that Application was listed for hearing, the Applicant's counsel informed the Court that he wished to file an application for me to recuse myself from hearing the Application for bail pending appeal. The exact prayers in the Application dated 27/01/2020 are that:

a. That Nakuru High Court Criminal Case No. 81 of 2010 be transferred from this Court to another Court of equal jurisdiction.

b. That this Honourable Court be pleased to issue directions *as to the conduct of this matter*.

4. On the face of the Application, the Applicant has listed five grounds on which he seeks the prayers. They are as follows:

1. That Nakuru High Court Criminal Case No. 81 of 2010 was heard and determined in the High Court, at Nakuru. The sentence was pronounced by Hon. Justice Prof. Ngugi.

2. That it is prudent that the instant case be transferred to another Court which did not pass the sentence for danger of ridiculing the Court.

3. That the transfer is necessary to enable the Court exhaustively adjudicate upon all the issues to be raised in bond pending appeal in the matter.

4. That the Application for bond pending appeal which had already been certified ready for hearing and this further application is brought in good faith and without undue delay.

5. That no prejudice will be occasioned to any parties if Application is allowed.

5. The Application was argued orally. Mr. Kangangi argued it on behalf of the Applicant. Ms. Mburu opposed on behalf of the State.

6. Mr. Kangangi stated that the Applicant is "aware" that this Court is "capable and fair to the Convict" but "given that the Court sat through the sentencing" the Applicant is apprehensive that the Court will not be "in the best state of mind to give a bail pending appeal and deal with the application fairly." Mr. Kangangi relied on a decision he said was rendered by the Eldoret High Court which he cited as ***Kiptenei v Republic Misc. App. No. 82 of 2013***. He said that in that case Justice Tonui said that when there is apprehension in the mind of the Accused Person that there might be bias, that it is only prudent and fair that the Court recuses itself so that the Accused can be confident that he will get a fair treatment. He associated himself with those remarks and urged the Court to recuse itself.

7. I should point out that Mr. Kangangi did not supply the authority to the Court; and I was unable to find it during my research. I have, therefore, not considered it in rendering this decision.

8. Ms. Mburu vigorously opposed the Application. She argued that the Applicant has not demonstrated any reason for his apprehension of bias. She pointed out that the Applicant merely states that he is apprehensive because the Court sentenced him. She pointed out that the case was heard by a different judge who wrote the judgment and that this Court cannot be deemed prejudiced just because it passed sentence. She argued that this Court is now sitting in a different capacity and not as a trial Court. She urged the Court to dismiss the Application pointing out that it is unprecedented, unwarranted and would set a bad precedent.

9. It is true that this is an unprecedented Application. Ordinarily, a Court that has made a ruling or a judgment in a matter is not deemed to be "biased" for purposes of recusal motions in subsequent post-judgment applications absent special circumstances and reasons beyond the mere fact that the Court pronounced itself in the matter. Hence, for example, a Judicial Officer who has pronounced himself in a judgment in a matter before him or her is not deemed to be conflicted for purposes of hearing and disposing of a post-judgment application for a stay of execution. This is despite the fact that the Judicial Officer is called upon to determine, for example, the arguability of the appeal which has been filed against his or her judgment. The operating rule of law in the Common Law world is that such a Judicial Officer is not deemed to raise an apprehension of bias by the mere fact that they returned a verdict in the case.

10. The same rule operates when a Judicial Officer has pronounced himself in an interlocutory application which requires the Judicial Officer to determine tentatively the strength of a case as for example one is called to do in an application for interlocutory injunction. The mere fact that a Judicial Officer finds that a party has raised a prima facie case with a probability of success does not per se make the Judicial Officer biased requiring his recusal from hearing the substantive suit.

11. If the rule were otherwise, trials would be segmented with attendant inefficiencies, delays and potential for forum shopping. A different rule would also fundamentally misapprehend the role of recusals in trials and distort the test ordinarily used in motions for recusal.

12. In ***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:

> 7…….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. The Supreme Court, then, after a comparative detour in which it cites with approval, primarily, ***In R. v. Bow Street*** **Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.1) [2000] 1 A.C. 6; Perry v. Schwarzenegger, 671 F. 3d 1052; and South African Defence Force and Others v. Monnig and Others (1992) (3) SA 482 (A)** stated the test to be applied when a party requests a Judicial Officer to recuse themselves in the following terms:

> [T]he test for establishing a Judge's impartiality is the perception of a reasonable person, this being a "well-informed, thoughtful observer who understands all the facts", and who has "examined the record and the law"; and thus, "unsubstantiated suspicion of personal bias or prejudice" will not suffice.

14. In the same case, Ibrahim Mohammed, SCJ succinctly stated the applicable rule when a party pleads apprehension of bias on the part of the Judicial Officer. Ibrahim Mohamed, SCJ stated the rule thus:

> Lord Justice Edmund **Davis in Metropolitan**
>
> **Properties Co. (FGC) Ltd. Vs Lannon [1969] 1 QB**
>
> **577** stated that disqualification was imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias. Acker LJ in **R vs 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 a 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 will be inevitable.

In an article by a writer, **<u>Holly Stout (11 KBW)</u>** on the subject of "Bias', the author states:

> "… The test to be applied by a judge who recognizes a possible apparent bias is thus a "double real possibility" test; the question he/she must ask him/herself is whether or not there is a real possibility that fair-minded and informed observer might think that there was a real possibility of bias." (referred to **Porter –V-Magill (2002) 2 AC 357**).

15. As I have stated before, this progressive re-statement of the test for recusal for bias by Mohammed Ibrahim, SCJ is, in my view, the same one comprehended in the ***<u>Commentaries on</u> <u>the Bangalore Principles of Judicial Conduct</u>***, which, at paragraph 81 postulates that:

> The generally accepted criterion for disqualification is the reasonable apprehension of bias. Different formulas have been applied to determine whether there is an apprehension of bias or prejudgment. These have ranged from "a high probability" of bias to "a real likelihood", "a substantial possibility", and "a reasonable suspicion" of bias. The apprehension of bias must be a reasonable one, held by reasonable, fair minded and informed persons, who apply themselves to the question and obtain the required information.

> The test is "what would such a person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would such person think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly."

16. It is the same test laid down laid down in practical terms in South Africa in ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU)*** in the following terms:

> The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial." (footnotes omitted)

17. In the same pragmatic vein, In this case the South African Constitutional Court usefully held that there was a presumption in the law against partiality of judicial officers assigned to cases. The Court reasoned thus:

> This is based on the recognition that legal training and experience prepare Judges for the often difficult task of fairly determining where the truth may lie in a welter of contradictory evidence.

18. The effect of this presumption is that an applicant who alleges that a judge is biased or reasonably apprehended to be biased must establish with specificity the grounds upon which they hold their belief. In a later case, the South African Constitutional Court in ***South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)*** **2000 (3)** ***SA 705 (CC); 2000 (8) BCLR 886 (CC)*** while reiterating that there a presumption in favour of the impartiality of the Court, importantly added that it is a presumption which is not easily dislodged. The Court held that cogent and convincing evidence is necessary in order to do dislodge that presumption. The Court, in restating the "double real possibility test" quoted by Ibrahim SCJ in the ***Jasbir Singh Rai Case***, referred to the two contexts in which reasonableness fits into the enquiry. It emphasised that not only must the evaluation be made from the perspective of a reasonable person, but the perception of bias must itself also be reasonable.

19. Looking at this exposition of the law on recusals the question to ask is if the present application lays out any facts with specificity from which a reasonable evaluation can be made from the perspective of a reasonable person that the Applicant has a basis for objectively reasonable apprehension that this Court would be biased against him in considering his application for bail pending appeal.

20. The only fact that the Applicant puts forth for his apprehension is that this Court passed sentence on him upon his lawful conviction. Applying the rule of law exposited above, and especially the presumption against partiality of Judicial Officers assigned to cases yields only one possibility on the facts of this case: the Application has absolutely no merit. It is for dismissing which I hereby do.

21. Orders accordingly.

Dated and delivered at Nairobi this 23rd day of April, 2020.

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Ms. Verne Odero, and the Court Assistant were in attendance by video-conference set up at the Court's Boardroom. Representatives of the media and select members of the public were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.