REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

(Coram: A. C. Mrima, J.)

CRIMINAL APPEAL NO. 68 OF 2019

JACOB ONYANGO BONDO.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. C. M. Kamau Senior

Resident Magistrate in Rongo Senior Resident Magistrate's Court No. 489 of 2017 delivered on 10/09/2019)

JUDGMENT

1. The appeal subject of this judgement raises three main issues for consideration. They are whether the trial court erred in not recusing itself, whether the offence was proved as required in law and whether the sentence was manifestly excessive.

2. *Jacob Onyango Bondo*, the Appellant herein, was arraigned before the Senior Residents Magistrate's Court at Rongo on 20/02/2017 where he was charged with the offence of assault causing actual bodily harm contrary to **Section 251** of the **Penal Code, Cap. 63** of the Laws of Kenya.

3. The particulars of the offence were that '*on the 8th day of November 2017 at Kachiena village in North Kamagambo sub-location Rongo sub-county within Migori County in the Republic of Kenya, unlawfully assaulted BONDO ONDIEGE OUMA thereby occasioning him actual bodily harm.*'

4. The Appellant denied the charges and he was tried. Four witnesses testified in support of the prosecution's case. **PW1** was the complainant, *Bondo Ondiege Ouma***. PW2** was the wife of the complainant. A Clinical Officer at Rongo Sub-County Hospital testified as **PW3**. The investigating officer one PC Ronald Makori was unwell and was represented by **No. 100540 PC (W) Roselyne Anyango** attached to Kamagambo Police Station. She testified as **PW4**.

5. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to and gave a sworn defence. He called his neighbour who testified as **DW2** and his wife who testified as **DW3**. The Appellant appeared in person during the trial. For the purposes of this judgment I will refer to the witnesses according to the sequence in numbers in which they testified before the trial court.

6. The court rendered its judgment on 14/05/2018 where the Appellant was found guilty as charged. He was convicted and sentenced to pay a fine of Kshs. 100,000/= and in default to serve 12 months' imprisonment.

7. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal through *Mr. Ezra Odondi Awino*, Counsel. The Petition of Appeal filed on 23/09/2019 raised the three grounds which were stated in paragraph 1 above.

8. Directions were taken and the appeal was disposed of by way of written submissions. Counsel for the Appellant duly filed. He then highlighted on the submissions. He expounded on the grounds. He referred to the Court of Appeal in **Kinyatti vs. Republic (1984) eKLR** and to the High Court in **Ronald Nyaga Kiora vs. Republic (2019) eKLR** on the submission that the trial magistrate ought to have recused himself since he had previously tried the Appellant on two other criminal cases. The Appellant prayed for the appeal to be allowed, conviction quashed and sentence be set-aside.

9. The appeal was opposed by the State. It was submitted that the offence was proved beyond any peradventure. It was further submitted that any appearance of bias dose not lead to an acquittal and that the sentence was very lenient.

10. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okeno vs.**

R (1977) EALR 32 and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

11. In line with the foregoing, I will deal with the three grounds separately.

Recusal of the Learned Trial Magistrate:

12. The issue of recusal of the learned magistrate was not raised at the trial. It was instead raised on appeal when the *Mr. Awino* was instructed to appear for the Appellant.

13. There are two main instances in which a Judge or a judicial officer can recuse himself/herself in a matter before him/her. The first way is on an application by any of the parties in the matter. The application may be oral or written. The other way is on the Judge's or a judicial officer's own motion (*sue moto*).

14. In this case the Appellant contended that the learned magistrate ought to have recused himself *sue moto*. Needless to say, the guiding principles in instances when a Judge or a judicial officer is called upon to recuse himself/herself differ in the two instances. 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. (See **Kinyatti vs. Republic** (supra) and **Ronald Nyaga Kiora vs. Republic**

(supra).

15. On the other hand, the considerations by a Judge or a judicial officer on self-recusal depend on the ground(s) for such recusal. In this case the Appellant contended that there was real likelihood of impartiality or bias since the learned magistrate had on two occasions tried the Appellant before.

16. It is important not to lose sight of the fact that a Judge or a judicial officer is separate from the Court as an institution. The Supreme Court of Kenya in **Civil Application Nos. 11 and 12 of 2016 Hon. (Lady) Justice Kalpana H. Rawal, Hon. Justice Philip Tunoi and Hon. Justice David A. Onyancha vs. Judicial Service Commission & The Judiciary (2016) eKLR** dealt with the subject of recusal of Judges of the Supreme Court at length.

17. In the said decision, the then **Chief Justice Hon. Justice Mutunga** settled the issue of jurisdiction in light of recusal. He stated that: -

> ***[23] ……whether a judge or judges are disqualified from sitting does not take away the constitutionally bestowed jurisdiction of the Court for the simple reason that jurisdiction is attached to the Court as an institution and not the judges.***

18. On the essence of recusal of a Judge, my Lordship the Chief Justice expressed himself as follows: -

> ***[36] The pursuit of justice demands that judges act individually and impartially. Where lack of impartiality may raise perceptions of bias, such that members of the public may think justice has not been rendered, it is only fair and equitable that the court declines to adjudicate such matters……. to safeguard the integrity of the institution and to foster public confidence in the administration of justice.***

19. Adding his voice to the essence of recusal My Lordship **Ibrahim SCJ** in **Hon. (Lady) Justice Kalpana H. Rawal, Hon. Justice Philip Tunoi and Hon. Justice David A. Onyancha** case (supra) stated that: -

> ***[125] Recusal is indeed a judicial duty and it does not amount to a judge abrogating his . her duty. A part from personally recusing to safeguard one's integrity and the sanctity of proceedings, recusal also helps protect the integrity and dignity of the bigger institution, that is, the judiciary and aids in championing its independence. While it may be argued that recusal in this matter or disqualification may compromise the parties' right to appeal, the integrity of the institution of the judiciary is a matter not to be eroded or treated cursorily or of secondary importance.***

20. The Supreme Court in **Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others [2013] eKLR** set the test for recusal of Judges on the basis of perception of bias. The Court held: -

> ***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.***

21. In the **Jasbir Singh Rai & 3 others** case (supra) my Lordship **Ibrahim SCJ** further stated that: -

> ***[P]ublic confidence in the administration of justice required that the judge implicated disqualifies himself, it was irrelevant that there was in fact no bias on the part of the judge, and there is no question of investigating whether there was any likelihood of bias or any reasonable suspicion of bias on the fact of that particular case.*** (emphasis added).

22. Further, my Lordship **Ibrahim SCJ** in **Hon. (Lady) Justice Kalpana H. Rawal, Hon. Justice Philip Tunoi and Hon. Justice David A. Onyancha** case (supra) revisited the applicable principles as follows: -

> ***[98] In the case of Bernert v Absa Ltd [2010]ZACC 28 the Constitutional Court set down the applicable legal principles in a case that concerned the apprehension of bias thus:***
>
> *"The apprehension of bias may arise either from the association or interest that the judicial officer has in one of the litigants before the court or from the interest that the judicial officer has in the outcome of the case. Or it may arise from the conduct or utterances by a judicial officer prior to or during proceedings. In all these situations, the judicial officer must ordinarily recuse himself or herself. The apprehension of bias principle reflects the fundamental principle of our Constitution that courts must be independent and impart. And fundamental to our judicial system is that courts must not only be independent and impartial, but they must be seen to be independent and impartial."*
>
> ***[99] The Court held that the test for recusal which had been adopted by the Court was whether there is a reasonable apprehension of bias, in the mind of a reasonable litigant in possession of all the relevant facts, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court. Further, it was stated that judicial officers are required by the Constitution to apply the Constitution and the law 'impartially and without and without fear, favour or prejudice, That their oath of office requires them to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.***

23. A Judge or judicial officer may even after forming an opinion to recuse himself/herself from the matter still seek the consensus of the parties not to opt out of the matter. My Lordship **Ibrahim SCJ** in **Hon. (Lady) Justice Kalpana H. Rawal, Hon. Justice Philip Tunoi and Hon. Justice David A. Onyancha** case (supra) had the following to say on the issue: -

> ***[105] Even where a judge finds that even after holding a particular position, he is still able to rise above that position and is willing to be persuaded, in such a case, a judge may wish to possibly persuade the parties that he wishes to hear the matter and he will be open-minded and objective. Where parties after being so informed agree, the judge may continue to sit. This happened in the case of National Bank of Kenya vs Anaj Ware Housing Corporation Limited, Petition No. 36 of 2014, in which I had heard the matter as a High Court judge. when the matter finally reached the Supreme Court on appeal, I revealed to the parties that I had heard the matter in the High Court and invited the parties if they so wished that I opt out. However, I indicated that I was open to be convinced otherwise on merit since I had made my decision in the High Court by only applying the principles of stare decisis. Both parties before the Court submitted that they did not wish that I recuse myself, I heard the case and agreeing with my colleagues, we rendered a unanimous decision that reversed my holding in the High Court.***

24. A Judge or judicial officer may also not opt out of a matter on the basis of the *doctrine of necessity*. This doctrine was discussed in detail in **Hon. (Lady) Justice Kalpana H. Rawal, Hon. Justice Philip Tunoi and Hon. Justice David A. Onyancha** case (supra).

25. The test was also considered by the Court of Appeal in **Civil Application No. NAI 6 of 2016 Justice Philip K. Tunoi & Another vs. The Judicial Service Commission & Another (2016) eKLR.** the Court expressed itself thus: -

> ***39. The House of Lords held in R . Gough [1993]AC 646 that the test to be applied in all cases of apparent bias was the same, whether being applied by the Judge during the trial or by the Court of Appeal when considering the matter on appeal, namely whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand.***
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> ***40. The test in R v. Gough was subsequently adjusted by the House of Lords in Porter v. Magill [2002] 1 All ER 465 when the House of Lords opined that the words "a real danger" in the test served no useful purposes and accordingly held that-***
>
> *"[T] he question is whether5 the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*
>
> ***41. In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.***
>
> ***42. In Taylor v. Lawrence [2003]QB 528 at page 548, in which an application was made to reopen an appeal on the ground that the Judge was biased, the Judge having instructed the plaintiffs' solicitors many years previously the House of Lords in the judgment of Lord Woolf CJ reiterated:***
>
> *"…we believe the modest adjustment in R v. Gough is called for which makes it plain that it is, in effect, no different from the test applied in most of the commonwealth and in Scotland."*
>
> *"The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."*
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> ***46. We take cognizance that the right to fair hearing is embedded in our constitution which emphasizes that justice must be done to all without delay or undue regard to procedural technicalities. The Constitution has vested in the courts judicial authority and mandate and has expressly stated that the right to fair hearing cannot be limited or abridged. It is absolute.***

47. The Judicial Service Code of Conduct and Ethics made by the Judicial Service Commission pursuant to Section 5(1) of the Public Officer Ethics Act, 2003 contains general rules of conduct and ethics to be observed by judicial officers so as to maintain the integrity and independence of the judicial service. Rule 10(1) of the Code of Conduct requires Judges of the Superior Courts as public officers to carry out their duties in accordance with the law. In carrying out their duties, they are required not to violate the rights and freedoms of any person under Part V of the Constitution.

48. Specifically, under Rule 5 of the Code, as judicial officer is required to disqualify himself or herself in proceedings where his/her impartiality might reasonably be questioned including but not limited to instances in which he has a personal bias or prejudice concerning a party or his advocate or personal knowledge of facts in the proceedings before him. These rules are intended to ensure maintenance by judicial officers of integrity and independence of the judicial service.

26. I believe I have demonstrated the applicable legal principles in cases of recusal on the basis of apprehension of bias. I will hence apply those principles in this case.

27. The background of the quest for recusal were two other cases which **Hon. C. M. Kamau**, SRM, handled. The cases were *Rongo Senior Resident Magistrates Court Criminal Cases No. 358 of 2016* and *No. 63 of 2015.* In *Criminal Case No. 358 of 2016* the Appellant was charged with two counts of malicious damage to property contrary to **Section 339(1)** of the **Penal Code**. The complainant was *Elly Otieno Ouma* who was a neighbour of the Appellant. The Appellant was acquitted under **Section 215** of the **Criminal Procedure Code**. In *Criminal Case No. 63 of 2015* the Appellant was charged with assault causing actual bodily harm. The complainant was *John Ochieng Hawaga*. *Bondo Ndiege Ouma* was a witness. The Appellant was found guilty and convicted. He was sentenced to 18 months' imprisonment.

28. *Rongo Senior Resident Magistrates Court Criminal Case No. 489 of 2017* is the subject of this appeal. As said, the Appellant was charged with assault causing actual bodily harm. The complainant was *Bondo Ndiege Ouma.* The complainant was a witness in Criminal *Case No. 63 of 2015* where the Appellant was convicted by the learned magistrate. The Appellant was again convicted and accordingly sentenced in *Criminal Case No. 489 of 2017*. The Appellant and *Bondo Ndiege Ouma* are blood brothers.

29. The Appellant was hence tried in 2015, 2016 and 2017. **Hon. C. M. Kamau**, SRM, conducted all the three trials. All the three criminal cases resulted from land disputes within the family of the Appellant and also between the family of the Appellant and their neighbours.

30. After the delivery of the judgment the prosecution drew the court's attention to the fact that the Appellant had been involved in a series of other related criminal cases before that court. The trial court acknowledged that fact and noted that the Appellant had a previous conviction. The court also noted that the Appellant harbored a lot of bitterness towards his brother, *Bondo Ndiege Ouma,* the complainant in the case subject of appeal.

31. The learned magistrate was hence well aware that he had previously tried the Appellant in relation to disputes over their family land. The case at hand also arose from disputes over the very land.

32. That was the background to the appeal subject of this judgment. By subjecting the foregone background to a reasonable, fair-minded and informed observer, it is clear that justice and fairness demanded that **Hon. C. M. Kamau**, SRM, was to recuse himself from hearing *Rongo Senior Resident Magistrates Court Criminal Case No. 489 of 2017,* the subject of this appeal. In fact, it did not matter whether there was in fact no bias on the part of **Hon. C. M. Kamau**. The totality of the circumstances demanded that the officer recused himself *sue moto*.

33. I am aware that since 2015 Rongo Law Courts has had two magistrates of competent jurisdiction to try the offences which the Appellant faced. Since the doctrine of necessity has not been invoked, I will rest the matter at that.

34. Having so said, the question which calls for an answer is the effect of the foregone on the trial of the Appellant in *Rongo Senior Resident Magistrates Court Criminal Case No. 489 of 2017.*

35. **Article 50(1)** of the **Constitution** states as follows: -

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

36. The right to a fair hearing is among those rights which cannot be limited under **Article 25** of the **Constitution**. As rightly as stated by **Mativo, J** in **Joseph Ndungu Kagiri vs. Republic (2016) eKLR** it is a right placed on '*a higher pedestal'*. The Appellant was therefore not accorded a fair trial. The trial cannot therefore stand. The appeal is allowed, conviction is hereby quashed and the sentence set-aside.

37. Should the Appellant be retried or acquitted? The Court of Appeal in **Samuel Wahini Ngugi v. R (2012) eKLR** stated as follows on retrial:

The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:

It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.……In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused

person

That decision was echoed in the case of Lolimo <u>Ekimat vs. R, Criminal Appeal No. 151 of 2004</u> (unreported)when this Court stated as follows:

…*the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.*

38. The error on the record was occasioned by the trial court. The Appellant was sentenced to pay fine of Kshs. 100,000/= or be imprisoned for 12 months. The Appellant was sentenced on 10/09/2019. As the Appellant could not raise the fine, he began serving the jail term. The Appellant was to be released from prison on 09/05/2020 by taking remission of the sentence into account. This Court released the Appellant on a personal bond on 18/12/2019 pending this judgment. By then the Appellant had been in prison for three months.

39. A look at the sentence provided in law, the period the Appellant was in prison and the circumstances of this case, the Appellant would have served a sufficient custodial sentence even if he is retried, found guilty and re-sentenced.

40. The fairest order in this matter is to acquit the Appellant. Since the Appellant is on personal bond he is forthwith be set at liberty unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 22nd day of May, 2020.**

A. C. MRIMA

<u>JUDGE</u>

<u>Judgment delivered in open Court and in the presence of:</u>

Mr. Awino, Counsel for the Appellant.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant