REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

HIGH COURT CRIMINAL REVISION NO. E001 OF 2020

LESIIT, J

TERESIAH WAIRIMU MUTURI.....1ST APPLICANT

MARGARET WANJIRU KAGO.....2ND APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

CHIEF MAGISTRATE'S COURT KIBERA.....2ND RESPONDENT

(Being Revision of the RULING of Hon. GANDANI (CM) in Kibera Chief Magistrate's Criminal Case No. 4635 of 2014 dated 25th January 2019)

RULING ON REVISION

1. The application before me is a notice of motion dated 20th July 2020. It has been brought under **section 81(1)(ii)** and **Section 364(1)(b)** of the **Criminal Procedure Code**. It seeks two substantive prayers as follows:

> **(1) That this Honourable Court do revise the Order issued on 25th January 2019 in Kibera Cr. Case No. 4635 of 2014 and do order release to the 1st Applicant the cash bail of Kshs.1,000,000/- deposited into court by Kamau Kahwai (deceased) who was the 1st accused in Kibera Cr. Case No. 4635 of 2014.**
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> **(2) That this Honourable court do order Kibera Criminal Case No. 4635 of2014 to be heard and determined in a different and/or another court.**

2. It is based upon the following grounds:

> **(a) That the Applicants are the 2nd and 3rd accused persons in the Kibera Cr. Case No. 4635 of 2014.**
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> **(b) That the said criminal case is part heard before Hon. J. Gandani (CM) who has refused to disqualify herself from hearing the case.**
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> **(c) That the said Magistrate has shown open bias against the Applicants in handling of the matter.**
>
> **(d) That the said Magistrate has refused to order release of the cash bail deposited by the 1st accused, Kamau Kahwai who is since deceased having passed away on 3rd September 2016.**
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> **(e) That the presiding Magistrate has violated the Applicants' constitutional rights.**
>
> **(f) That it is in the interest of justice that the orders be granted.**

3. The application is also supported by two affidavits sworn by the 1st and 2nd Applicants in this Criminal Revision Application. Each of the Applicants in their affidavit, made similar depositions. The first being that the trial Magistrate Hon. J. Gadhani (CM) has shown open bias in her handling of the matter by, on various occasions disallowing objections raised by their Advocate as to interference in the Court Proceedings by the Complainant. They further deposed that the learned trial Magistrate allowed witness expenses to be paid for a prosecution witness who allegedly travelled from Meru for hearing of the case, yet the witness is resident in Nairobi.

4. They further deposed that the learned trial Magistrate refused to grant an order for the release of the cash bail of KShs. 1,000,000/- which was deposited into court by the 1st accused person, Kamau Kahwai now deceased. They deposed that the learned trial Magistrate asked the Complainant whether he objected to the release of the cash bail deposited into court by the 1st accused (deceased), yet a Complainant has no say in the release of the cash bail.

5. The Applicants have deposed that the learned trial Magistrate issued a warrant of arrest on 29th October 2018 allegedly for failing to appear in court, which was thereafter found to have been an error. The Applicants contend that they were arrested by police on the same date the warrant was issued against them which they deposed was unusual and highly suspicious. They contend that for these reasons they believe they will not have a fair and impartial trial before the learned trial Magistrate.

6. The application is opposed by the State through grounds of opposition in which the following grounds are raised:

I. an abuse of court process and is intended to delay or defeat the ends of justice.

II. The application is against the provision of section 9(1) (b) of the Victim Protection Act which provides for the conclusion of cases in good time.

III. The application goes against the rights of the vulnerable victims on account of disability as per the provision of section 17(1) (e) of the Victim Protection Act.

IV. That if the matter is transferred to another court it will be unfair to the complainant who is blind owing to the complexities that were involved in conducting the trial just in case orders are given that the matter starts "de novo".

V). The applicants have failed to demonstrate the biasness on the part of the court to warrant the matter being transferred to another court.

VI). The grounds given by the applicants do not fall within the parameters for recusal by a court.

VII) The applicants are not prejudiced as they have a right of appeal once their matter has been concluded as per article 50(2) (q) of the Constitution.

VIII) That decisions on bail are within the court's discretion and in this case it was exercised well by the court in withholding the cash bail until the case is finalized.

IX). That the orders sought by the applicant are premature as the issue of refund of cash bail can be determined once the matter has been finalized.

X). That the applicant is not prejudiced by the court's order not to release the cash bail to them at it is not a final order.

7. I heard the Applicants' Counsel, Mr. Mungai and the Counsel for the State, Ms. Nyauncho through Microsoft Teams, on 13th August, 2020 The Counsels reiterated what e=was contained in their filed documents, which I have considered.

8. Just to give a background the Applicants are charged with another, now deceased, before Kibera CM's Court for **Obtaining Money by False Pretence** contrary to **section 313 of the Penal Code.** The is accused, now deceased, and the 2nd accused were husband and wife respectively. They face the same charges. The case is at the defence stage coming up on the 2oth August, 2020.

9. This application is requesting two orders, one for review of an order declining release of cash bail and two, an order transferring the case to a court outside of Kibera Law Court. Regarding the cash bail, it is the Applicant's contention that there was no justification in holding the cash bail of an accused person who has died before the case was concluded. They contend that the cash bail should have been released automatically upon demise of the deceased accused.

10. Ms. Nyaucho, learned Prosecution Counsel urged that the learned trial Magistrate indicated that she would rule on the issue of cash bail at a later stage. This is not contested.

11. There is nothing in law preventing a trial court from ruling on an issue at any time before the conclusion of the case. I did not have the benefit of seeing the trial court's proceedings and I do not wish to speculate on the matter. However, it was quite in order for the trial court to decide to rule on the issue on bail at a later stage. At this stage this court can only remind the trial magistrate to ensure they rule on the issue of cash bail, at the very latest, before the court becomes functus officio.

12. On the second order sought, considering the grounds on the face of the application and the affidavits sworn by the Applicants, there are 4 grounds upon which this application is made. These are that the learned trial magistrate has shown open bias against the Applicants in handling of the matter. This was elaborated to mean that refusal to release cash bail of a deceased accused; the issuance of warrants of arrest which were later found to have been erroneously issued; allowing payment of witness expenses from Meru, for a witness who was resident of Nairobi; and, on various occasions disallowing objections raised by their Advocate as to interference in the Court Proceedings by the Complainant.

13. I take **Article 50 (1)** of the **Constitution** as the pillar on which this application stands, that, *"**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".

14. The **Black's Law Dictionary, 8th Edition** at page 171 defines the word bias as;

> ***"Inclination; prejudice, …., judicial bias. A Judge's bias toward one or more of the parties to a case over which the Judge presides. Judicial bias is usually insufficient to justify disqualifying a Judge from presiding over a case. To justify disqualification or recusal, the Judge's bias usually must be personal or based on some extra judicial reason."***

15. While the same dictionary at page 1303 defines recusal as;

> ***"Removal of oneself as Judge or policy-maker in a particular matter because of a conflict of interest."***

16. The Applicant herein seeks that the case be transferred from the trial Magistrate hearing it on various grounds cited. These grounds include allegations of open bias against the Applicants. The issue of recusal of judicial officers from matters owing to their alleged bias in a particular case has been addressed in various case law.

17. The leading case on what should be considered in determining whether a judge should be recused from trying a case, in my view, is the Supreme Court case of **Jasbir Singh Rai & 3 Others -Vs- Tarlochan Singh Rai & 4 Others (2013) eKLR,** Supreme Court of Kenya Petition No. 4 of 2012 Hon. Justices P. K. Tunoi, J. B. Ojwang, N. S. Ndungu, M. K. Ibrahim and S. Wanjala (JJSC) had this to say;

> ***"(6) Recusal as a general principle, has been much practised in the history of the East African Judiciaries, even though its ethical dimensions have not always been taken into account. The term, is thus defined in Black's Law Dictionary, 8th Edition (2004) (P. 1303);***
>
> *'Removal of oneself as Judge or policy maker in a particular matter, (especially) because of conflict of interest'**."***
>
> ***[7] From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. 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.***
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> ***[8] It is an insightful perception in the common law tradition, that the justice of a case does not always rest on the straight lines cut by statutory prescriptions, and the judicial discretion in its delicate profile, is critical to equitable outcomes. This is what Sir David Maxwell Fyfe meant when he attributed to Lord Atkin a "constructive intuition which operates after learning and analysis are exhausted" [in G. Lewis, Lord Atkin (London: Butterworths, 1983), p. 166]. It is precisely such delicate elements of judicial fairness that will also feature in the judgment as to whether or not the recusal of a Judge, particularly in the case of a collegiate Bench, is of any materiality, in a given case.***
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> ***[9] Different jurisdictions make provisions, through statute or practice directions, for certain grounds for the recusal or disqualification of Judges hearing matters in Court. The most common examples, in this regard are: where the judicial officer is a party; or related to a party; or is a material witness; or has a financial interest in the outcome of the case; or had previously acted as counsel for a party.***
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> **[10] *In R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte* Pinochet Ugarte (No.1) [2000] 1 A.C. 6, the English House of Lords [now the Supreme Court] had just rendered a judgment when it became known that a member of the collegiate Bench involved, was an unpaid director and chairman of Amnesty International Charity Limited, an organization set up and controlled by Amnesty International; and the same member's wife was also employed by Amnesty International. In the said judgment, it had been held that General Pinochet, the Chilean Head of State, was not immune from arrest and extradition, in relation to crimes against humanity which he was alleged to have committed while in office. The House of Lords, at the commencement of the hearing, had given permission for Amnesty International to join in as intervener. A newly constituted Bench of five Judges held unanimously that the earlier judgment must be set aside, because one of the members of the Bench should have been disqualified from hearing the case; as that member had had an interest in the outcome of the proceedings.**
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> **[11] In an American case, *Perry v. Schwarzenegger*, 671 F. 3d 1052 (9th Circ. February 7, 2012) it was held that the 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.**
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> **[12] Such a broad test is adopted too in *South African Defence Force and Others v. Monnig and Others* (1992) (3) SA 482 (A), p.491: *"The recusal right is derived from one of a number of rules of natural justice designed to ensure that a person accused before a court of law should have a fair trial."***

18.In testing as to whether an issue at hand is worthy recusal, the learned judge Ibrahim, JSC, in the case of ***Jasbir Singh Rai supra*** had this to say:

> "The Test **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, Holly Stout (11 KBW) 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)."

19. **In the case of Republic Vs. David Makali & 3 Others, Criminal Application Nos. Nai 4 & 5 Of 1994 (unreported) Per** TUNOI JA summarized the legal position on recusal in Kenya as follows:

"That being the position as I see it when the courts, in this country are faced with such proceedings as these, [i.e. proceedings for the disqualification of a judge] it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established. It is my view that where any such allegation is made, the court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their cases before a court or quasi -judicial tribunal, they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the Judge, Magistrate or Tribunal."

20. In **JGK Vs FWK in Meru High Court Civil Case No. 19 of 2017**,(OS) Gikonyo J observed thus:

"My position has always been that recusal should not be undertaken lightly or anyhow, but, upon a conscientious decision based on plausible reasons backed by evidence, say, bias or prejudice or conflict of interest or personal interest on the part of a judge. The stringent test is more in accord with the constitutional desire to attain the independence of the judge in the administration of justice free from intimidation or blackmail. The trait not to fear or show favouritism in a case is instilled by the Constitution and oath of office of a judge. These principles guarantee and are indispensable facets of fair hearing and access to justice. The presumption therefore is that parties submit themselves to a court manned by independent, thoroughly fearless and impartial judicial officers. What must therefore be avoided is a practice that may encourage parties to 'shop' for judges who they believe will be favourable to their causes. I lament that forum-shopping returns us to the darkest days in the administration of justice; it erodes all the gains made and distorts the values, objects and purposes of the Constitution. See Articles 10, 50, 159(2) (a), 160 and 259 of the Constitution of Kenya, 2010. Such vice will kill the entire justice system in any civilized society. My earnest view is that law serves legitimate interests of a litigant as opposed to individual desires that a particular judge should or should not hear its case, and its greater concern is to build an independent and robust judicial practice in the adjudication of cases for all.

21. The learned judge continued to cite a Supreme Court case thus:

"The Supreme Court put it aptly in Gladys Boss Shollei v Judicial Service Commission & another [2018] eKLR and Specifically Ibrahim. SCJ. in his Concurring opinion stated;

"[25] Tied to the constitutional argument above, is the doctrine of the duty of a judge to sit. Though not profound in our jurisdiction, every judge has a duty to sit, in a matter which he duly should sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office: "to serve impartially; and to protect, administer and defend the Constitution." It is a doctrine that recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties' right to have their cases heard and determined before a court of law.

[26] In respect of this doctrine of a judge's duty to sit, Justice Rolston F. Nelson; of the Caribbean Court of Justice in his treatise – "Judicial Continuing Education Workshop: Recusal, Contempt of Court and Judicial Ethics; May 4, 2012; observed:

"A judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason" (emphasis mine)

[27] In the case of Simonson –vs- General Motors Corporation U.S.D.C. p.425 R. Supp, 574, 578 (1978), the United States District Court, Eastern District of Pennsylvania, had this to say:-

"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" . . ."

22. In the case of ***Patrick Ndegwa Warungu Vs. Republic in the High Court at Milimani Criminal Application No. 440 Of 2003*** Ombija J.

on refusing to grant the transfer of the matter from one judicial officer to another in the Magistrate Court observed as follows;

> **"The principles upon which transfer may be granted has been crystallized in several authorities the leading one being SHILENJE v THE REPUBLIC [1980] KLR 132 which lays down the law that for the High Court to order a transfer there must be reasonable apprehension in the applicant's or any right thinking person's mind that a fair and impartial trial might not be had before the magistrate whether one takes the incidences individually or collectively. Concomitantly there must be something before the court to make it appear that it is expedient for the ends of justice that an order for transfer ought to be made.**
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> **I derive much help froim Sir H.T. Trinsep and Sir John Wrodroffes i.e. the former's commentary and Notes (14th Edition) (1906) and the later's Criminal Procedure in Briston India (1926). The principles which come out clearly are that the High Court will always require some strong grounds for transferring a case from one judicial officer to another. The court has to consider whether there has been any real bias in the mind of the presiding judge and/or magistrate and also whether incidences have happened which might create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial. Whether such apprehension is reasonable must be determined with reference to the mind of the court rather than the mind of the accused. On the evidence before me, in light of the provision of section 87 of the Criminal Procedure Code, I take the view that the withdrawal of the applicant's bond on allegations of the complainant does not constitute enough reason to transfer the case bearing in mind the fact that the magistrate after the result of the investigation reinstated the applicant's bond."**

23. In the ***Commentaries on the Bangalore Principles of Judicial Conduct***, sets out the test to be applied when considering an application for the disqualification of a judge or judicial officer at paragraph 81 and 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."***

24. I have carefully considered this application. Having considered the grounds on which it was premised, only one ground stands a test for consideration for disqualification of a trail judge or judicial officer. This is the one of open bias against the Applicants. The basis for that was given as open bias in her handling of the matter by, on various occasions disallowing objections raised by their Advocate as to interference in the Court Proceedings by the Complainant; issuing a warrant of arrest erroneously; paying witness expenses to undeserving person and failure to release cash bail of a deceased accused.

25. Having considered the law on the issue of bias, it is crystal clear to me that perceptions 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. an interest in the outcome of the proceedings.

26. It is clear that perception is very important. Various precedents have given further guidance as to the basis upon which perception can be tested. The 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.

27. It is clear that whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice, is key in determining the matter. The test is objective and the facts constituting bias must be specifically alleged and established.

28. I have scrutinized the allegations made, in the Applicants' affidavits and find that on the issues raised, no substantiation was offered. The basis for allegation of open bias was given as disallowing objections raised by their Advocate as to interference in the Court Proceedings by the Complainant. The alleged interferences were not substantiated. In any event, the Applicants are not without remedy. They can raise these issues on appeal, which will give the court an opportunity to consider the entire conduct of the case by the trial court.

29. The other allegation of bias was issuance of warrants of arrest erroneously. This cannot be a ground to allege bias. The learned trial magistrate is human and, as the old adage goes, to err is human.

30. As for paying witness expenses to undeserving person, this cannot support an allegation of bias. In any event, payment of witness expenses is not paid based on where one's residence is, but on where they traveled from on at the time they testified.

31. As to failure to release cash bail of a deceased accused, I have already said I found no fault in the earned trial magistrate's decision to delay a determination on that matter.

32. For the High Court to order a transfer of a matter from one magistrates court to another, there must be reasonable apprehension in the Applicants or any right thinking person's mind that a fair and impartial trial might not be had before the magistrate. I find that the *apprehension of bias in this case is not a reasonable one, and is not one that can be held by reasonable, fair minded and informed persons.*

33. In the result, the Applicants application lacks in merit and is accordingly dismissed in its entirety with no order as to costs.

DATED THIS 19TH DAY OF AUGUST, 2020

DELIVERED THROUGH EMAIL AT 3.30PM

LESIIT, J.

JUDGE