REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL CASE NO. 8 OF 2019

REPUBLIC.....RESPONDENT

VERSUS

WILLIAM LOPOLIAN.....1ST ACCUSED

JOSEPH MBUGUA NJOROGE.....2ND ACCUSED

DUNCAN GICHUKI IRUNGU.....3RD ACCUSED

SANTOS OPIYO.....4TH ACCUSED

DIBA BANCHALE.....5TH ACCUSED

MOHAMED KULLOW DUBE.....6TH ACCUSED

RULING

1. William Lopolian, Joseph Mbugua Njoroge, Duncan Gichuki Irungu, Santos Opiyo, Diba Banchale and Mohamed Kullow Dube, being the 1st to 6th accused respectively are facing trial for the murder of Lami Bocha.

2. The accused persons took plea on 8th April, 2019 and pleaded not guilty.

3. On 11th June, 2019, prior to the commencement of the trial, and during the pendency of an interlocutory application dated 16th May, 2019 filed by the State, Mr. Mouko, learned counsel for the 1st, 3rd, 4th and 5th accused persons sought time to file an application for my recusal which is the subject of this ruling.

4. The Notice of Motion dated 19th June 2019 was filed on behalf of all the Accused persons. It sought orders that I recuse myself from hearing or further hearing any matters in this suit; that the case be transferred to another court for hearing and disposal; and any other or further procedural direction as the Honourable Court deems fit to grant.

5. The Application is premised on the grounds reproduced verbatim that:-

> i. Justice will not be seen to be done or to have been done at the end of the case.
>
> ii. The accused persons are uncomfortable and unsure that justice will be done if the matter is to proceed before the Honourable learned judge.
>
> iii. The local politicians have already spread rumours that they are in control of the matter and that the accused are in court as a matter of formality but they will be convicted at the end of the day.
>
> iv. There is a lot of rumours in the public domain regarding this matter which is easily accessible by virtue of the fact that the purported victim hailed from Garsen and most of the witnesses, which is causing a lot of anxiety to the accused person.'' (sic!)

6. The Application was supported by the Affidavit of William Lopolian, the 1st accused person, sworn on the same date and on behalf of the

all the accused persons. His averments were to the effect that the court directed the Accused to take plea in Garsen contrary to the order of Hon. Wewa directing the matter to be mentioned before the judge in Malindi, and; that the court had taken long to deliver its ruling on bail and also denied the accused persons bail on flimsy grounds.

7. The 1st accused further deposed that there was a lot of political influence in the matter as the Senator of Tana River County and the MP of Garsen, were in attendance in court at both Malindi and Garsen and had vowed to teach the accused persons a lesson alleging that many people had been killed in the parks. He averred that the MP of Garsen had escorted the accused persons from Malindi to Garsen; had parked his vehicle next to the DCI's vehicle in court and had promised to buy fans for the Garsen court. He further averred that the perception was that the politicians were in control of the case and that they would do everything in their power to ensure the accused were convicted.

8. The prosecution opposed the Application by way of a Replying Affidavit sworn by the Assistant Superintendent of Police Charles Ate Kamil dated 1st July 2019. He averred that the D.C.I as a division of the National Police Service was impartial and independent of control by any person or authority. That the investigation began when victims of the alleged murder made a report to the DCI Tana Delta.

9. ASP Kamil further stated that while the accused persons tried to cast aspersions on the independence of the D.C.I, they had failed to portray bias on the part of the court. That the court as established under Chapter 10 of the Constitution makes independent decisions based on facts and evidence and rumours play no part in the decision making process. He averred that the accused persons had complained of political influence even when the matter was at Malindi and that they would continue to do so even if the matter was transferred to another court within the reach of the politicians.

10. Finally, ASP Kamil averred that transferring the matter to another court would delay the matter as it would pose logistical challenges in mobilizing and availing witnesses, and; would cause mental anguish to the victims of the offence as they would also incur unnecessary expenses in travel.

11. Parties filed their written submissions, which they highlighted during hearing on the 4th July 2019.

12. Mr. Okanga learned counsel for the Applicants submitted that the court had ignored a valid order from the Senior Principal Magistrate to place the matter before the judge at Malindi and that this action created a perception that there might be no fairness. Secondly, he submitted that there was a pending charge against the 2nd accused person in Malindi Criminal Case No. 4 of 2019 and that the court ought to have ordered the accused to be be taken back to have the charge withdrawn.

13. Counsel submitted that in a case for recusal what mattered was the perception of a reasonable person that the court may not grant justice and the perception was that the accused persons will not get justice. He relied on the case of **Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others [2013] eKLR.**

14. Mr. Kasyoka learned prosecution counsel, submitted that on the issue of the orders, the court rendered a decision which was not appealed and that the application was based on rumours and innuendo. He stated that the attack on the DCI had no bearing on the independence of the court and that for the court to recuse itself it had to see whether the decision was good or not in law. He relied on the case of **R vs IEBC and 3 others ex-parte Wavinya Ndeti [2017] eKLR**.

15. Ms. Thuku, learned counsel watching brief for the deceased's family, associated herself with the prosecution's submissions. She further submitted that the family of the victim was entitled to expeditious disposal of the matter and transferring the matter amounted to denying them justice as most of the witnesses were from Garsen and were not so well off as to afford the travel costs.

16. In reply, Mr. Okanga for thee accused submitted that the state had enormous resources to take witnesses to any part of the country. Mr. Magolo also for the accused persons added that in an application for recusal the court was to be guided by perception. He reiterated that the perception of the accused persons, who are reasonable people, was that they would not get justice.

17. I have considered the application, the rival affidavits and the submissions of the parties. The only issue that arises is whether I should recuse myself from further hearing this matter.

18. The Black's Law Dictionary 8th Edition defines recusal as: ***"Removal of oneself as judge or policy-maker in a particular matter, especially because of a conflict of interest''.***

19. The principles and grounds upon which a judicial officer may recuse himself or herself have been set out in many decisions. **In Re Estate of Gitere Kahura (Deceased) Succession Cause No. 265 OF 2009 [2019] eKLR** this court outlined grounds for recusal of a judge as follows:

1. In matters of conflict of interest.

2. If a judge is biased or seen to favor one party.

3. If a judge handled the matter previously as a lawyer in private practice.

4. If there is ex parte communication between the judge and one of the parties.

5. When a judge predicts that he or she may be impartial in a matter.

20. In **Jasbir Singh Rai & 3 Others *v* Tarlochan Singh Rai & 4 Others(2013) eKLR,** the Supreme Court pronounced itself on recusal of a judicial officer in the following words:-

> ***'[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.***

21. In **Kalpana H. Rawal, Philip Tunoi & David A. Onyancha v Judicial Service Commission & Judiciary Civil Application 11 & 12 of 2016 (Consolidated) [2016] eKLR** the Supreme Court stated as follows:-

> ***"68] There is a presumption of impartiality of a Judge which must be disproved by a party alleging bias on the part of the Judge. Similarly, it is expected that a judge will disqualify him or herself if he or she is biased. According to Professor Groves M, in "The Rule Against Bias" [2009] U Monash LRS 10, bias may be actual or apprehended. He observes that:***
>
> ***"Bias may take many different forms but the main distinction is between actual and apprehended bias. A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand. A claim of apprehended bias requires a finding that a fair minded and reasonably well informed observer might conclude that the decision-maker did not approach the issue with an open mind."***

22. Black's Law Dictionary, 8th Edition defines **bias** as '***Inclination; prejudice; predilection'*** *and* judicial bias as '***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 extrajudicial reason'.***

23. The test on whether a judicial officer should recuse himself or herself is an objective test, where the reasonable and fair-minded person might perceive bias. In **Republic v Engineers Board of Kenya Exparte Godfrey Ajoung Okumu Miscellaneous Civil Application No. 107 of 2018 [2018] eKLR** Mativo J held that:-

> ***"Apprehended bias is assessed objectively, by reference to conclusions that may be reasonably drawn about what an observer might conclude about the possible views and behavior of the decision-maker.[66] Each form of bias also requires differing standards of evidence.[67]… A claim of apprehended bias requires considerably less evidence. A court need only be satisfied that a fair minded and informed observer might conclude there was a real possibility that the decision-maker was not impartial.[69]"***

24. In **Jasbir Singh Rai & 3 Others *v* Tarlochan Singh Rai & 4 Others (*Supra)*** the Apex court stated as thus:-

> ***'[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.***

28. In **Leonard Njoroge Kariuki & another v Director of Public Prosecutions & another [2018] eKLR** Ngugi J relied on he **Commentaries on the Bangalore Principles of Judicial Conduct**, which propositions 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."***

25. I take guidance from the exposition of the law and principles in the authorities above. I will now deal with each of the grounds raised by the Applicants in the light of these principles.

26. All the averments and submissions in this application can be distilled into three grounds. The accused are apprehensive that they may not get justice because of likelihood of political interference in the case; that the court directed that they take plea in Garsen despite their having been arraigned in Malindi, and; that the court denied them bail.

27. On the first ground, the Accused have expressed fear that their trial in Garsen will be influenced by politicians. William Lopolian, the 1st Accused/Applicant deposed in paragraph 7 of his Supporting Affidavit that:-

> **'7. That the local MP of Garsen and the Senator Tana River County were both in Malindi following up the matter and were afraid that they would exert unfair influence not necessarily through the court, but other concerned bodies.''**

Further, in paragraph 10 (ii) he deponed that:-

'When we appeared in Malindi Court, both the MP Mr. Wario and the Senator's presence was all over''

28. As can be seen from the averments, the concern of the accused is that the politicians were following their case closely and have to that end been in communication with the investigators and attended court both in Malindi and in Garsen. Indeed the Accused have in their grounds of the application cited rumour in the public domain that the politicians were interested in the conviction of the accused. They allege that there was a cosy relationship between the politicians and the Office of the Director of Public Prosecution. They state that on the day they appeared in court, that the MP of Garsen had parked his motor vehicle next the DCI's motor vehicle at the court parking. Further, they state that the MP for Garsen was overheard saying that he would buy fans for the court building.

29. The question here is whether the allegations stated above can be the basis of reasonable apprehension on the part of the accused. In the widely referenced case of **President of the Republic of South Africa *v* South African Rugby Football Union [1999] 4 S A 147**, the Constitutional Court of South Africa held that:-

> ***'It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. 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……."***

30. On who is a reasonable and fair-minded observer, Onguto J in **National Oil Corporation of Kenya v Real Energy Limited Civil Case No. 144 of 2017 [2017] eKLR** stated that:-

> ***37. The test to be applied was whether a fair minded and informed observer would conclude that there existed a real possibility of bias. It is not, as was submitted by the defendant's counsel, a question of perception as viewed by the party himself…….***
>
> ***"The observer who is fair minded is the sort of a person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious…Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively…….Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant…….She is the sort of person who takes the trouble to inform herself on all matters that are relevant.***

31. The concern that politicians were present in court must be seen against the right to public trial which is one of the safeguards of the accused persons' right to a fair trial enshrined in **Article 50(2)(d)** of the Constitution. **Section 77** of the Criminal Procedure Code similarly provides that criminal courts are open courts, which the public can access. There are also clear guidelines on when a court can exclude any person from attending court proceedings.

32. From the stated facts, it is difficult for one to discern how the presence of the politicians in court in a public trial would influence the court's judicial function. It is also not clear how the alleged cosy relationship between the DCI and the political class would result in any form of bias on the part of the court. The DPP is a party to the case just as the Accused persons are a party in this case, the judge is the arbiter whose constitutional duty is to receive and analyse all evidence presented by both parties apply the law and reach a just and fair decision. The relations therefore have no bearing on how the court shall decide the case and this ground cannot pass the objective test of reasonable bias.

33. It should also be remembered that under **Article 160 (1)** of the Constitution of Kenya that the court is independent and free from the control and direction of any person or authority. In **President of the Republic of South Africa *v* South African Rugby Football Union *(Supra)*** it was held that:-

> ***"…. 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…."***

34. A careful reading of the accused's application shows that their fears of political influence in their case are based on rumour and innuendo. Courts cannot and ought not to be guided by rumour and innuendo. Indeed the accused have stated that the politicians were also present in Malindi court. It therefore means that as long as the political leaders can attend court anywhere in the Republic, the accused would still be filled with apprehension of political influence. They have not proved how the attendance of a public trial by politicians would influence the decisions of the court.

35. Further, the allegation that the local MP would buy fans for the court building is far-fetched. Even if that were to happen, it would be lawful within the mandate of the National Government Constituency Development Fund, and needless to state, there are legal and administrative public procurement processes for any such engagement with court administrative officials and the trial judge has no role to play.

36. With respect to bail, the accused have made three allegations. Firstly, they state that the ruling was delayed. Secondly, they state that they were denied bail on flimsy reasons. Thirdly, they believe that the court's decision was influenced by politicians. William Lopolian stated at

paragraph 12 of his supporting affidavit that:-

> **'The perception being created outside is that the politicians are in control by having us removed from Malindi illegally ensuring that we will not be granted bail and that eventually we will be convicted''**

37. On the 1st allegation, the record shows that the application was heard on 8th April 2019. In reserving the ruling, the court informed the parties that it was proceeding on court Easter recess on 10th April 2019 and would render ruling in the new term and the same was delivered on 8th May 2019. The accused were denied bail for reasons set out in the reasoned ruling. As pointed out in the ruling, the right to bail or bond is not absolute as it can be denied where there is a compelling reason; that courts' are guided by the Bail and Bond policy Guidelines, which set out factors to be considered in granting or denying bail and, and; it is the duty of the prosecution to demonstrate compelling reasons to deny bail.

38. In reaching my decision, I found that the prosecution had discharged its burden of proving a compelling reason to deny the Accused persons bail. The prosecution had claimed that the Accused persons would interfere and intimidate witnesses, which was based on the evidence that the Accused persons had tried to resist investigations and even intimidated investigators who are police officers.

39. I made a finding that the accused were likely to intimidate and interfere with vulnerable witnesses. My decision was not influenced by the alleged rumour and innuendo of political influence, but was grounded on sound jurisprudence. It was also guided by the Bail Bond Policy Guidelines where **Section 4.9 (e)** provides that the likelihood of an accused person interfering with witnesses is a compelling enough reason to deny bail. This is not, as claimed by the Accused, a "flimsy" reason and shows no sign of bias on the part of the court. In any event, the Accused persons have exercised their right of appeal on the said decision.

40. It is to be remembered that the denial or grant of bail has no bearing on the outcome of a criminal trial. Indeed there are instances where an accused may be granted bail and end up being convicted, just as there are instances where an accused who is denied bail end up being acquitted. It is to be remembered also that the standard of proof in a trial is one beyond reasonable doubt, unlike in a bail application. It is clear then that the apprehension by the accused that they may not get a fair trial based on a bail ruling is misconceived and cannot pass the test of reasonable apprehension.

41. Lastly, the Accused have asserted bias stating that I handled the matter despite an order issued by Hon. S.R. Wewa (S.P.M) and Deputy Registrar, Malindi dated 3rd April 2019, directing that the file, Misc. No. 54 of 2019, be placed before the Hon. Nyakundi for directions.

42. A review of the facts is that upon arrest of the Accused Persons, they were presented before the court in Malindi, where the police applied for orders to allow them to detain the accused persons for seven more days to allow them to complete their investigations. According to the Applicants, the prosecution informed the court that they had finished their investigations and that they wished to charge five of the Accused persons in Garsen while the 2nd Accused person was to be charged at Malindi. That the Accused persons through their counsel objected to the decision to try them in Garsen leading to the orders dated 3rd April 2019.

43. On 4th April 2019, the Accused persons were brought before me for the purposes of taking plea when the Accused persons counsel objected to the same based on the order of Hon. Wewa. After listening to arguments on both sides, I directed that plea be taken before me on the 8th April 2019 after the Accused persons received treatment for injuries suffered in an accident during their transportation to court. My directions giving a date for plea were contested by the defence who insisted that the accused be taken back to Malindi to appear before Hon. Justice Nyakundi as per the directions of the Deputy Registrar.

44. In my brief ruling given in the course of the proceedings, I found that both parties had agreed that the incident took place within the territorial jurisdiction of this court and therefore the correct court to try the matter was this court. As to whether I should have sent back the file to Malindi court, the record shows that I did inform the parties that there was no sitting Judge in Malindi and that a notice had been issued informing all litigants that, my brother, Hon. Nyakundi J. was at the time on medical leave. As a result all urgent matters had been referred to this court for appropriate directions and therefore in the interest of justice I directed that the matter proceeds before me.

45. The record clearly shows that I sought, and obtained confirmation from the parties before plea that none of the five accused persons had been charged in Malindi. With respect to the 2nd accused, whom the court was informed had been charged in Malindi, there was confirmation from the prosecution counsel that the charge in Malindi had been withdrawn.

46. I have considered the above facts against the applicable law. **Article 165 (3)(a)** of the Constitution give the High Court unlimited original jurisdiction in criminal matters, while **Section 66** of the CPC gives courts general authority to try a matter and states:-

> **'Every court has authority to cause to be brought before it any person who is within the local limits of its jurisdiction and is charged with an offence committed within Kenya, or which according to law may be dealt with as if it had been committed within Kenya, and to deal with the accused person according to its jurisdiction.''**

47. **Section 71** of the CPC provides for the ordinary place of trial as states:-

> **''Subject to the provisions of section 69, and to the powers of transfer conferred by sections 79 and 81, every offence shall ordinarily be tried by a court within the local limits of whose jurisdiction it was committed, or within the local limits of whose jurisdiction the accused was apprehended, or is in custody on a charge for the offence, or has appeared in answer to a summons lawfully issued charging the offence.''**

48. In determining the jurisdiction of the court Ogola J in **Republic v Gilbert Maina & 2 others [2016] eKLR** held that:-

> ***'12. From the above texts, it is the finding of this court that it has the jurisdiction to try the applicants in this court. However, that jurisdiction can only be exercised by this court upon the court being satisfied that the court with preference in jurisdiction is, for good reason, not able to exercise that jurisdiction……..''***

49. It is clear from the chronology of events above that there was no good reason why the Accused would elect where to be charged when it was clear that the incident was within the territorial jurisdiction of this court. It is evident that the decision was grounded in law and there was no bias or unfairness in this matter. Besides, if the Accused were aggrieved with the order, they had the right to appeal but chose not to. Instead, they subjected themselves to this court and it was only after they were denied bail that they sought my recusal.

50. In his concurring ruling in **Gladys Boss Shollei v Judicial Service Commission & another [2018] eKLR**, Ibrahim SCJ stated as thus:-

> ***"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."(Emphasis mine).***

51. In the case of **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others Civil Appeal no. 36 of 1996 (1997) eKLR,** the court held as follows:

> ***"... 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."***

52. Similarly in **Re Estate of Gitere Kahura (Deceased) (Supra)** Ongeri J quoted with approval **the High Court of Australia [In *Re J.R.L.:Exparte C.J.L.* (1986) 161 CLR 342 at 352.]** where Mason J stated that:-

> ***"While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour……To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself. "***

53. The authorities above buttress the position that recusal must be based on sound principles and on an objective test of reasonable bias. I have carefully examined all the grounds raised by the Accused against the facts, applicable principles and law in this matter. I find that the accused's apprehension of bias or partiality on the part of the court does not meet the objective test of a reasonable, fair minded and informed observer.

54. In the premise, I find the application devoid of merit. It is dismissed in its entirety.

Ruling dated delivered and signed at Garsen on this 30th day of September 2019.

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R. LAGAT KORIR

JUDGE

In the presence of:

S.Pacho, Court Assistant,

All six Accused

Mr. Mwangi, for Prosecution

Mr.Nyongesa for all Accused.