



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

MISC. CRIMINAL APPLICATION NO.6 OF 2019

(Originating from Nyahururu CM's Court SOA.No.33 of 2018 by: Hon. S.N. Mwangi – S.R.M.)

PAUL KIPKOECH KISOREN.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Paul Kipkoech Kisoren (applicant) is charged with the offence of **Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act**. He is alleged to have defiled a girl M.W, a girl aged 15 years.

The case is partially heard and still pending before Hon. Mwangi, SRM.

The applicant has filed this application seeking the transfer of this case to another Magistrate other than Hon. Mwangi for hearing and determination for several reasons. He also prays that the court do review his bond terms.

The applicant claims to have been a student at Pan African High School in form three before his arrest and as a result of the arrest, his education has been disrupted; that the court forced him to use a medical report of the complainant which does not have a rubber stamp of the hospital and signature of the medical officer; that the complainant came to court and denied knowing the applicant but the court remanded her 3 times and forced her to agree to knowing him so that she could be released and indeed she was only released after accepting that she knew him and testifying against him; that the court did not allow him to cross – examine witnesses and threatened to imprison him for 20 years; that when he was denied a chance to cross – examine the witness, the court indicated that it would proceed under Section 98; that despite the fact that he filed this application, the court continued to hear the case; that he was denied witness some statements, for example that of the complainant's mother.

Ms. Rugut, learned Counsel for the State opposed the application for reasons that the complainant (PW1) was a refractory witness and the law allows the court to place her in custody till she is able to testify and that is therefore no reason to seek a transfer of the case from the trial magistrate.

Counsel also submitted that the applicant has always been allowed a chance to cross – examine witnesses but sometimes he opted to remain silent.

Counsel did not oppose the application for the variation of bond terms provided the court calls for a pre-bail report and also confirms whether indeed the applicant is indeed a student.

I have considered the grounds upon which the applicant seeks the transfer of this case to another magistrate for trial. **Article 50 (1) of the Constitution guarantees** the right of everyone to have a fair and public hearing before a court or independent tribunal. The right cannot be limited or abridged. **Article 25** also states that it is one of the rights that cannot be limited. **Article 50 (1) and 25 despite (c)** guarantee the right to a fair hearing. When a party asks a Judge/Magistrate to recuse himself, he is alleging that he will not get a fair trial before that court or he apprehends bias by that court.

Recusal of a Judge or Magistrate from hearing a case is an exercise of the court's discretion given the special circumstances of each individual case. Justice **Bolston 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 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.”

The foundation for the principle underlying recusal of Judicial Officers was restated by the Supreme Court in Jasbir Singh & 3 Others vs Tarlochan Singh Rai and 4 Others Petition No. 04/2012 (2013) eKLR as follows;

“Recusal, as a general principle, has been much practiced 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 ed. (2004) [p.1303]:

“Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest.”

From the 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.”

see also Misc Cr. App. 82/2013 Barnaba Kipsongok Tenai vs Republic.

The test to be applied in cases of apparent bias was set by the House of Lords in the case of Porter vs Magill (2002) I ALL ER 465 when the court held;

“The question is whether the fair minded and informed observer having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

When faced with such an application, the court has to consider whether there is a reasonable ground for assuming the possibility of bias and whether it is likely to produce in the minds of the public at large, a reasonable doubt, the reasonableness of the Judge/Magistrate.

It is the applicant who has to specifically allege the facts for the court’s consideration.

The complainant was called to testify as PW3 on 24/01/2019. After she had partially testified, the State Counsel applied to stand her down and declared her a refractory witness. Counsel requested that PW3 be remanded at Nyahururu Police Station. The court observed **“Indeed, the minor after being asked several times has refused to say what she recorded yet she acknowledged her signature and her statement. She is therefore declared a refractory witness and detained for 8 days at Nyahururu Police Station. Further hearing on 01/02/2019.”**

On 01/02/2019, the State Counsel was not available to proceed with the hearing. The hearing was adjourned to 04/02/2019. On that date, PW3 went ahead and testified. After she completed her testimony, the applicant was called upon to cross – examine PW3 but instead stated that he had no faith in the court.

Section 152 of the CPC Act provides as follows;

Refractory witnesses

“1. Whenever a person, appearing either in obedience to a summons or by virtue of a warrant, or being present in court and being verbally required by the court to give evidence:

- (a) Refuses to be sworn; or**
- (b) Having been sworn, refuses to answer any question put to him; or**
- (c) Refuses or neglects to produce any document or thing which he is required to produce; or**
- (d) Refuses to sign his deposition,**

Without offering sufficient excuse for his refusal or neglect, the court may adjourn the case for any period not exceeding eight days, and may in the meantime commit that person to prison, unless he sooner consents to do what is required of him.

2. If the person, upon being brought before the court at or before the adjourned hearing, again refuses to do what is required of him, the court may again adjourn the case and commit him for the same period, and so again from time to time until the person consents to do what is so required of him.

3. Nothing contained in this section shall affect the liability of any such person to any other punishment or proceeding for refusing or neglecting to do what is so required of him, or shall prevent the court from disposing of the case in the meantime according to any other sufficient evidence taken before it.”

From the above provision, it is clear what a refractory witness is, one who was summoned to appear or while in court and is required to give

evidence, refuses to be sworn or after being sworn, refuses to respond to questions or produce a document or exhibit which is required of him. If that witness does not explain his action, then the court invokes the procedure in **Section 152 CPC**. The court noted that the witness had refused to answer questions put to her before the State Counsel made an application to declare PW3 a refractory witness. I therefore find that the trial court did act within the law in remanding PW3 until she came and answered questions put to her in terms of her statement and that is no reason for the court to recuse itself.

The applicant also complained that he was not allowed to cross – examine some witnesses. From the record, the applicant cross – examined PW1 and 2 at length. PW1 is a Doctor while PW2 is the complainant’s father.

After PW3 testified, the applicant declined to cross examine him. He also refused to cross, the complainant’s mother, PW4. The applicant objected to the substitute investigating officer from testifying. It is clear that the accused opted not to cross – examine witnesses after PW3 testified. The court could not force him to cross – examine them. He waived his right to do so and cannot blame the trial court for that.

The appellant also complained that the trial court continued with the case yet he had filed this application before the High Court. The filing of this application before this court did not act an automatic stay of the lower court proceedings. Since this court had not granted any stay, the trial in the lower court could proceed and the trial court cannot be faulted for continuing with the trial. In fact, once the trial court confirmed that indeed this instant application had been filed, it halted the hearing but by then the applicant had been placed on his defence.

This is not an appeal. The applicant seemed to be challenging the veracity and admissibility of the doctor’s evidence but that is not for this court to deal at this stage. That can only be challenged on appeal, if it will necessary.

The applicant also complained that he told the court that he is a student at Pan African High School and the court has declined to grant him bond or review the terms. When the applicant alleged that he was 17 years old, an age assessment was conducted at J.M. Kariuki County Hospital which found him to be 18 years.

As to the applicant’s contention that he is a student, the court asked the probation officer to procure a social enquiry report which is on the file. It is dated 23/05/2018. It confirms that the applicant had joined Pan African High School in Kisima in 2017 but left school in 2017 and at the time of arrest in April, 2018, he was not attending school. The court granted the applicant bond of Kshs.200,000/= and even on learning that he was 18 years old, and not in school, the court did not alter the said terms. Since then the applicant has not requested for variation of bond terms.

The grant of bond by a court is an exercise of its discretion. Unless the applicant shows that the said exercise was not judicious or actuated by some bias on the part of the court, it cannot be a ground to ask for recusal.

Having considered all the grounds raised by the applicant, I find no reason to impute bias or likelihood of bias on the part of the trial court. Unless good reasons are shown, the court must be firm and not allow frivolous applications for recusal as the same would be an abuse of the court process and used for forum shopping.

I therefore find no good reason adduced to warrant the transfer of this case to a different magistrate other than the one seized of the matter now.

As regards bond, the applicant has already been placed on his defence and I believe the case is about to come to an end. But just, in the event that it is delayed, I hereby reduce/alter the bond terms and order that the applicant may be released on bond of Kshs.100,000/= with a surety of the same amount or cash bail of Kshs.50,000/=.

It is so ordered

Dated, Signed and Delivered at NYAHURURU this 26th day of November, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut for State

Soi Court Assistant

Applicant - present