



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO.323 OF 2016**

E M N.....APPLICANT

**VERSUS**

REPUBLIC.....RESPONDENT

**RULING**

The Applicant, E M N is facing a charge before the trial magistrate's court of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. He is also facing the alternative charge of **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. He pleaded not guilty to both counts. Trial has commenced. The complainant has testified. It appears from the record that the Applicant did not cross-examine the complainant because he was removed from the court for disrupting proceedings. On several occasions, the trial court referred the Applicant for treatment at Mathare Mental Hospital. It appeared that the trial court formed the view that the Applicant was not mentally fit, at the time, to stand trial. On account of this fact, the Applicant's trial before the magistrate's court has been suspended since 29<sup>th</sup> September 2016. Meanwhile, the Applicant has remained in remand custody.

The Applicant has now made an application before this court to have the trial court hearing his case be disqualified on the grounds that the court was biased against him. The Applicant states that from the way the proceedings have so far been conducted, it was clear that the trial court had already formed an opinion about him. He was irked that he had been forced to proceed with the case before he was supplied with the witnesses' statements. He was unsure if he would get fair trial before the court. He further urged the court to order that the trial starts *de novo* before another court by the complainant being recalled to testify in the case. He stated that at the time the complainant testified, he was not in a mental state to proceed with the hearing of the case. He was therefore of the view that if justice was to be done, the case had to start afresh. He further asked to be released on a free bond pending the hearing and determination of the case.

Ms. Kimiri for the State opposed the application. She was of the view that the Applicant was essentially engaging in forum shopping. She submitted that the Applicant had made it difficult for the court to conduct proceedings to the extent that he was excluded from the proceedings. She urged the court not to allow the Applicant's application for the complainant to be recalled to testify in the case. She stated that the complainant was traumatized by the experience to the extent that she required counselling before she could agree to come to court to offer her testimony. She asked the court to balance the right of the complainant as a victim of crime and that of the Applicant and make an appropriate determination.

This court has considered the rival arguments made by the parties to this application. The Applicant has sought three prayers before this court. The first prayer that he seeks is the disqualification of the trial court from further hearing his case. The Applicant alleges that the trial court is biased against him and there was a chance that he would not get justice from the court. Interestingly, the Applicant has not given any evidence to support his claim that the trial court is biased against him. On perusal of the trial court's record, it was apparent to this court that when the Applicant saw the complainant in court, he raised a ruckus in court, apparently with the aim of frustrating the trial of the case on the particular day. When his request for the case to be adjourned was denied, he walked out of the court. The court proceeded to hear the complainant's testimony. It is on the basis of this decision that the Applicant is of the view that the trial court was biased against him. This court cannot issue an order disqualifying the trial court from hearing the case. If the Applicant desires to have the trial court to disqualify itself from hearing the case, he should make the application before that court for the court to consider whether or not sufficient basis has been laid for it to be disqualified.

The trial court will of course be guided by among other decisions, the decision of the Court of Appeal in **Philip K. Tunoi & Another –vs- Judicial Service Commission & Another [2016] eKLR**. In this case, the Court of Appeal cited with approval the United Kingdom's House of Lords decision in **Taylor v. Lawrence [2003] QB 528** at Page 548 where it was held thus:

**“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 real possibility, or a real danger, the two being the same, that the tribunal was biased.”**

In the present application, the Applicant will have the opportunity to present his application before the trial court. This court will therefore refrain from making further comment on this matter until the trial court has an opportunity to address the question of its disqualification.

As regards the question whether the Applicant can be allowed to recall the complainant, that is an issue that will also be addressed by the trial court. The Applicant is at liberty to apply before the trial court for the complainant to be recalled to testify in the case. The Applicant is also at liberty to apply for the review of his bond terms before the trial court. He shall be at liberty to apply in the event that he shall be dissatisfied with any decision rendered by the trial court.

In the premises therefore, this court finds that the application made by the Applicant is prematurely before this court. The same is dismissed.

The trial court's file is sent to the trial court for hearing and disposal of the matters that have been raised by the Applicant. The matter shall be mentioned on **25<sup>th</sup> June 2018** before the trial court for further orders. It is so ordered.

**DATED AT NAIROBI THIS 18<sup>TH</sup> DAY OF JUNE 2018**

**L. KIMARU**

**JUDGE**