

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HCRA NO. 18 OF 2018

MUIA KIVINDYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Before this court is the appellant's notice of motion dated 25th June, 2018 seeking the recusal of this court. In his supporting affidavit, the appellant stated that the court made an undertaking to fast track his appeal after declining to give him bail but that the court will be taking a break in July and August, 2018. He lamented that this court is biased in the manner in which it is handling his appeal and that his right is thereby being defiled and suffocated. He sought that the matter be transferred to another court for hearing and determination of his appeal.

2. The appellant herein sought bail/bond pending determination of his appeal by a notice of motion filed on 15th February, 2018. This court considered the motion and declined the bail/bond on the basis that the appellant during mitigation asked for forgiveness and requested to be given time to refund money claimed to have been falsely obtained which fact was found to diminish his chances of success. The court was however keen not to pre-empt the outcome of the appeal. The second ground upon which the court declined to grant bail/bond was the fact that the appellant had earlier absconded court as was noted by Nyamweya J on 8th March, 2018.

3. As undertaken by this court on the issue of fast tracking the case, the proceedings have been certified and the lower court record availed to the Appellant. What is left is the taking of directions and subsequently hearing of the appeal. Although the appellant claims that this court is bias, it must be noted that the allegations claimed to form biased are in fact proper procedure and discretion applied by the court. This court considered all the relevant factors in granting bail/bond pending appeal.

and whereas, this court is aware of the Constitutional right under Article 49 (1) (h) of the Constitution to grant bail, no compelling reasons were demonstrated by the appellant who upon conviction does not enjoy the presumption of innocence. It must be further noted that the fact that an application is unopposed does not automatically leads to granting of orders sought. The court must always exercise its discretion and consider matters on their merit as was done in this case. I am thus guided by the Court of Appeal decision in **Kamlesh Mansuklal Damji Pattni & Another v. Republic Nairobi HCMA No. 322 of 1999** where it was held:

“No recognized human right or fundamental freedom is contravened by a judgment or order that is wrong and liable to set aside on appeal for an error of fact or substantive law...The remedy for errors of this kind is to appeal to a higher court and where there are no higher courts to appeal to, then no one can say that there was an error. The fundamental right is not a legal system that is infallible but one that is fair. It is only errors of procedure that are capable of constituting infringement to the rights protection and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to failure to observe one of the fundamental rules of natural justice.”

In the end, I find that the appellant has not demonstrated bias or at all on the part of this court to warrant its recusal. The Appellant seems to be out on a forum shopping which cannot be countenanced. The Application fails in the circumstances and is hereby dismissed. The Appellant is directed to proceed to take directions on the disposal of the appeal herein.

Dated and delivered at Machakos this 26th day of July,2018.

D.K. KEMEI

JUDGE

In the presence of:-

Machogu - for the Respondent

Muia Kivindyo - for the Applicant

Josephine - Court Assistant