



**REPUBLIC OF KENYA**

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

**MISC. APP.NO.30 OF 2018**

**SIMON NGUNJIRI MWANGI.....APPLICANT**

**-V E R S U S -**

**REPUBLIC.....PROSECUTOR**

**RULING**

The applicant herein, **Simon Ngunjiri Mwangi**, jointly with others, is charged with the offence of **breaking into a Building and Committing a felony Contrary to Section 306(a) of the Penal Code**.

The matter is part heard before Hon. Momanyi, SRM. The applicant has filed an application on 3/12/2018 seeking that this court do order a transfer of this case to another Magistrate for hearing.

The grounds upon which he bases his application are that the trial court has delayed the hearing of the case, in that the court was not sitting four times when the matter came up for hearing; that the prosecutor has been allowed many adjournments; that the court violated his rights by not having exhibits produced before the court and also for not insisting that the police return to them their property. He also complained that the complainant has failed to come to court many times and when he did, he claimed the exhibits had been burnt and he wondered why the complainant has the exhibits; that he was lost faith in the court and wants to be tried by any other court.

On 14/5/2018, the prosecution applied for an adjournment for lack of witnesses and the applicant and his co-accused objected to the adjournment save for accused 3 whose advocate was absent. The 1<sup>st</sup> accused applied that the court do step aside from the matter. The court ruled that the allegations laid against the court were baseless, unfounded and ill-informed and that if he recused himself, the matter will delay further and the application was declined

**Article 50 of the Constitution** guarantees an accused's person right to a fair hearing which includes a speedy trial amongst other rights.

Article 50 reads as follows

**“Article 50**

**i) 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.**

**2 (e) To have the trial begin and conclude without unreasonable delay**

The applicant was arraigned in court on 2/5/2017. I have seen the court record that on 4/7/2017 the prosecution had 3 witnesses but the applicant and 2<sup>nd</sup> accused said that they had not been given witness statements. On 1/8/2017, the same application was made. On 5/9/2017, the court prosecutor said that the exhibits had been burnt and he was not able to produce them and on 23/10/2017, 28/2/2018, 14/5/2018, the prosecutor was not ready to proceed.

On 24/7/2018, the court prosecutor was said to be ill. On 28/9/2018, no witnesses attended. It is not until 19/11/2018 that the case proceeded with one witness.

In my view the court has been too generous with granting the prosecution adjournments.

A Judge or Magistrate may recuse himself from Judicial proceedings over allegations of bias or conflict of interest. In **Jasbir Singh & 30 others Vs Tarlochan Singh and 4 others, 2013 eKLR**, the Supreme Court of Kenya considered the issues of recusal and said:

**“ 6. Recusal as a general principle, has been much practiced in the history of 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 5<sup>th</sup> Edition (2004) (Page 1303).**

**“Removal of oneself as Judge or policy maker in a particular matter (especially) because of conflict of interest”.**

**7. 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 that 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 its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised**

**(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..... ..”**

From a reading of the above decision, it is clear that what amounts to bias will vary from case to case.

In this case, the various adjournments by the court were an exercise of the court’s discretion and from the record, there is no evidence that the court was influenced by any extraneous considerations to impute bias on the magistrate.

As regards the allegations that the court did not call for the applicant’s property, soon after plea, the court had ordered the Investigating Officer to return the applicant’s property if they were not exhibits.

Generally, apart from the delay, I find no evidence of bias on the part of the court. However due to delay of the hearing, if this case is transferred to another court, it will occasion even more delay of the hearing and determination of the case. I therefore decline to grant the application for recusal but because of the apparent delay, I direct that the court do hear and determine the case within the next three months from today’s date. It is so ordered.

**Signed and Dated at NYAHURURU this 20<sup>th</sup> day of December, 2018.**

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**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Mr. Mutembei for the State Counsel

Soi- Court Assistant

Applicant- in person