



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 507 OF 2015

DAVID WILLIAM TETT.....PETITIONER

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

Introduction

1. I intend to be relatively short in this matter.
2. The Petitioner is an inmate at Kenya's sole maximum security prison. By his petition dated 17 November 2015, the Petitioner seeks orders to compel a judge of this court Hon. Lady Justice G. W. Ngenye Macharia to withdraw from hearing an appeal lodged by the Petitioner. The Petitioner similarly seeks the withdrawal of another unnamed judge from hearing the same appeal. Finally, the Petitioner seeks the withdrawal of a learned counsel, also unnamed, from representing the Petitioner in the appeal.
3. The appeal in question is High Court Criminal Appeal No 164 of 2013. It arose from the judgment in a criminal case where the Petitioner had been charged with, tried and convicted of the offence of robbery with violence. The Petitioner was also handed the mandatory death sentence. In his appeal the Petitioner sought and prayed for a retrial.
4. Before this court now, the Petitioner states that he was not accorded a fair trial in the appeal. He states that he " *feels that the entire trial proceedings were not accorded [sic] impartiality and fairness during the hearing and that Hon Lady Justice Ngenye Macharia had presided the trial in the subordinate court*". In the Petitioner's view, Hon Lady Justice Ngenye Macharia should not have sat or continue to sit in the appeal in the circumstances. This was the gist of the Petitioner's written submissions. The Petitioner, in short, alleges bias.
5. The starting point should be whether this court has the necessary jurisdiction to entertain the instant petition. Ms. Ombogo in her brief oral submissions in response to the Petitioner's submissions stated that the Petitioner should have made an application for recusal before the court handling the criminal appeal. Ms. Ombogo added that the petition should have been filed in the criminal division of this court.
6. As has been stated umpteen times, jurisdiction is everything and without it a court should never move an inch with the proceedings but immediately down its tools: see Nyarangi JA in **Owners of the Motor Vessel" Lillian S" V- Caltex Oil (Kenya) Ltd[1989]1 KLR 1**. See also **Samuel**

Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others [2012]eKLR where the Supreme Court stated that jurisdiction flows from either the Constitution or legislation or from both.

7. In the instant Petition, the Petitioner is simply asking this court to superintend the court presided over by Lady Justice Ngenye Macharia. The High Court is effectively being asked to invoke its supervisory powers over the High Court.
8. Article 165(6) of the Constitution provides that

“The High Court has supervisory jurisdiction over subordinate courts and over any person or body or authority exercising a judicial or quasi-judicial function, but not over a superior court” (emphasis)

9. Clearly, Article 165(6) of the Constitution confers supervisory jurisdiction to the High Court over judicial bodies but also expressly places an edict that the High court cannot supervise another superior court.
10. Superior courts are indexed under Part 2 of Chapter 10 of the Constitution as the Supreme Court, the Court of Appeal, the High Court and courts with equal status of the High Court. In this regard it is to be noted that a High court is a High court and the mere fact of specific Divisions or stations having been created does not make any Division or station of the High court any bit superior than others. No station or division of the High court is clothed with any additional jurisdiction than what the Constitution already has donated.
11. It is not in controversy that Lady Justice Ngenye Macharia is a Judge of the High court. The criminal appeal filed by the Petitioner is also before the High Court. This court cannot superintend or supervise either the High Court where the appeal has been filed or even the presiding officers(judges) of the High Court. Indeed, this court cannot even direct the judge on how to run his court thanks to the existing even jurisdiction and the doctrine of judicial independence: see **Article 160(1)** of the Constitution and also the case of **Uhuru Highway Development Limited v Central bank of Kenya & 2 Others CACA No 36 of 1996**.
12. This position of the law was further expounded upon more clearly by Mumbi Ngugi J in the case of **Robert Mwangi v Shepherd Catering Ltd & another [2012]eKLR** when she stated , following arguments advanced by a party that the court sitting as a constitutional court has unlimited jurisdiction and can supervise the High Court as well as the Court of Appeal as follows:

“[If] I understand Mr. Odera correctly, his contention is that this Court as a Court in the Constitutional and Human Rights Division, in exercising the original jurisdiction conferred on the High Court under Article 165, can supervise even the Supreme Court and the Court of Appeal on matters of procedure. Even without reference to the existing judicial authorities on this point, this is not only an argument that flies in the face of clear constitutional provisions but is a totally fallacious argument that, taken to its logical conclusion, would lead to complete absurdities and reduce our judicial system into a comical farce....

[30]A judge sitting in the Constitutional and Human Rights Division has the same jurisdiction as any other judge sitting in any other Division of the High Court. To ask such a judge to adjudicate in a matter that is before another judge of the High Court is to ask the judge to act in a matter that he or she has no jurisdiction over, and for the judge to do that is to engage in a nullity. As Justice Nyarangi so succinctly put it in The Owners of the Motor Vessel “Lilians”vs Caltex Oil Kenya Ltd [1989] KLR I

“Jurisdiction is everything. Without it, a court has no power to make one more step”.

[31]. I think I need say no more in this matter save that I will not engage in a nullity and purport to supervise the functioning and conduct or decision making by a court of competent and concurrent jurisdiction. The petitioner’s application and the entire petition is an abuse of the court process and is hereby struck out with costs to the respondents.

13. I entirely agree with Mumbi Ngugi J and I also need say no more in the instant Petition. I must avoid any absurdity. This court cannot supervise the conduct or happening or decision of a court of concurrent and coordinate jurisdiction. If the Petitioner is unhappy with the happenings in the proceedings before Hon. Lady Justice Ngenye Macharia, the correct approach would be for the Petitioner to seek of the good judge to recuse herself. The judge has the residual jurisdiction to entertain an application for recusal at anytime : see **Attorney General v Nyongo & Others [2007]1 EA 12**. If an application for recusal is made on the grounds of apprehended bias or actual bias and the application is denied, then the applicant may move to challenge such denial by way of appeal.
14. For the foregoing reasons, I find that this petition is an abuse of the process of this court and is also vexing. It should not have been filed .
15. In the result, I strike it out for both want of jurisdiction and for being an abuse of the process.
16. There will however be no order as to costs , for obvious reason that the petitioner is an inmate.

Dated, signed and delivered at Nairobi this 29th day February, 2016

J.L.ONGUTO

JUDGE