

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 146 OF 2015

JOHN NJENGA KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

This appeal was coming up for delivery of judgment on 24th March, 2015 but the same was not ready. The court orally requested the parties to return for the judgment at 12.00 when the same would be ready but counsel for the Appellant informed the court that he would be attending a relative's burial. Consequently, judgment was set for delivery on 31st March, 2016. After making the pronouncement, Learned State Counsel Ms. Atina informed the court that the complainant in the trial was in court and had shown her a letter that she required me to disqualify myself from the appeal and more importantly from delivering the judgment. Learned counsel for the Appellant Mr. Wanjohi opposed the move as the matter was being raised when the court had already heard the appeal. The court noted that the letter Miss Atina was referring to was not on record but nevertheless asked the complainant to show it to the court. It was tendered before me. It was dated 17th March, 2016. The content of the letter was that I should not deliver the judgment because from the face of the record of the proceedings, while I was a magistrate, I had taken the evidence of PW1. And that therefore, I would not be an independent arbiter in the appeal. The true reflection of the record is that whilst I was a magistrate at Milimani Law Courts, I was in conduct of the trial before I was promoted as a Judge. I heard the evidence of PW1 and on elevation to the High Court the matter was re-allocated to another magistrate. Directions under Section 200 of the Criminal procedure Code were taken and the learned trial magistrate directed that the matter be heard afresh. When the appeal was placed before me for hearing on 27th February, 2016, I took note of the fact that I had heard the evidence of one witness after which the trial was heard *de novo*. I therefore asked the respective parties, as attested by the record whether they had any objection in me hearing the appeal. Learned counsel for the Appellant Mr. Wanjohi had no objection. The same case applied to the Learned State Counsel Ms. Nyauncho for the Respondent. I thereafter directed the parties to file written submissions and to return to court on 17th February, 2016 to highlight the same. Parties complied with the court's directions and on 25th February, 2016 I gave the date for judgment.

From the above observations, it is correct to conclude that the complainant was well represented by the learned State Counsel Miss Nyauncho when she submitted that she had no objection with the court hearing the appeal as the trial had been heard *de novo* before another magistrate other than myself. Be that as it may, it is within the right of the complainant to candidly speak out what he feels about the appeal. On the part of this court, it is clear that the complainant has not in any way demonstrated how this court would prejudice him or would not be impartial in the decision it arrives at. But as the adage goes "***justice must not only be done, but must be seen to be done***", I find it necessary to recuse myself in view of the complainant's request that the appeal be heard by another judge. In the circumstances, I recuse myself from further dealing with this appeal. The parties shall take a date in the registry for the hearing of the appeal before another Judge. Further, I hereby expunge from record all the proceedings which I recorded in this appeal. It is so ordered.

DATED and DELIVERED this 31st day of MARCH, 2016

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Wanjohi for the Appellant.*
2. *M/s Aluda for the Respondent*