REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 5 OF 2016

REPUBLIC .....RESPONDENT

VERSUS

SILAS MUTUMA MARIMI .....1ST ACCUSED

REUBEN MIANO .....2ND ACCUSED

WYCLIFFE WANGILA SIKUKU .....3RD ACCUSED

JUDGMENT

The three accused persons in this case have jointly been charged with the offence of **MURDER CONTRARY TO SECTION 203** as read with **SECTION 204 OF THE PENAL CODE**. Before the hearing of the trial could commence, the learned State Counsel **MS NGOVI** did on 4/5/2016 raise an objection to **MR. OGOLLA** Advocate appearing for the three accuseds. She sought to have learned counsel disqualified from acting in this matter on the basis that the firm of **GORDON OGOLLA, KIPKOECH & Co. ADVOCATES,** where Mr. Ogola is a partner had previously been engaged by the family of the deceased to hold a watching brief for them.

The application which was opposed was heard by way of oral submissions on 5/5/2016. **MS NGOVI** for the prosecution relied on rule 9 of the **Advocates (Practice) Rules** and submitted that this rule barred **Mr. Ogola** whose firm had previously represented the family of the deceased from now purporting to represent the accused persons in the murder trial. She submitted that the existence of an advocate-client relationship between the deceased's family and counsel created a fiduciary relationship which prevents counsel from disclosing confidential information that may have been disclosed to him as a result of and in the course of that advocate-client relationship.

MS NGOVI further submitted that it would be unethical for '**Mr. Ogola'** to continue to represent the accused person as there is an obvious conflict of interest between his current clients and the complainants. She informed the court that complainants were apprehensive that confidential information disclosed to the firm in which **Mr. Ogola** is a partner may be used to their detriment if counsel is allowed to continue representing the accused persons.

Mr.Ogola made his submissions in which he strenuously opposed the application seeking to disqualify him from acting in the matter. He submitted that the accused persons have a constitutional right to be represented by counsel of their choice. He argued that this court should not interfere with that right as it has not been demonstrated that the complainants would suffer any prejudice if he continued to act in this

matter.

‘Mr. Ogola’ argued that Rule 9 of the Advocates Practice Rules are not applicable in this matter as those rules only serve to bar an Advocate from acting in a matter where it is likely that he will be called to testify as a witness.

Counsel further submitted that where a firm consists of more than on advocate then under the Chinese Wall Principle, there exists a veil of confidentiality that prevents the disclosure of information from one advocate to the other. **‘Mr. Ogola’** explained that he did not **personally** handle the brief from the complainants as during the material time from March 2013 to December 2015, he was not in active legal practice, having been appointed as the Speaker of the Migori County Government. The complainant’s case was handled in its entirety by his partner **Mr Kipkoech**.

Counsel finally submitted that the test is whether any real prejudice was likely to be suffered by the complainant’s. He relied on the following two cases to buttress his submissions.

(i) National Bank of Kenya Ltd Vs Peter Kipkoech Korat & Another [2008] eKLR.

(ii) Geoffrey Asanyo Vs County Government of Nakuru ELRC Cause No. 398 of 2015 (unreported).

He urged the court to dismiss the prosecution request for his disqualification from acting in this murder trial.

ANALYSIS

I have carefully considered the submissions made both for and against this application. I have also read and considered the authorities cited by counsel. Mr. Ogola raised the following grounds in opposition to the application.

(a) The orders sought infringed the accused persons rights to counsel as enshrined in the Constitution of Kenya, 2010

(b) Rule 9 of the Advocates Practice Rules were not applicable in this case.

(c) No prejudice was likely to be suffered by the complainants as there was no likelihood that counsel would be called as a witness in the case.

I will now proceed to consider these grounds raised in opposition to the application together.

(a) Right to Counsel

Article 50(2)(g) of the Constitution of Kenya 2010 provides that an accused person has a right”-

“to choose, and be represented by an advocate and to be informed of this right promptly”

Undoubtedly an accused person is guaranteed the right to be represented by counsel of his own choice. The question then, is whether this an absolute right. That question was answered by the Court of Appeal in the case **of DELPHIS BANK LTD Vs CHATT & 6 OTHERS [2005] 1 KLR** where it was held that a litigant’s right to legal representation by an advocate of his choice is not absolute. In that case the Court of Appeal held as follows:-

“1. The right to a legal representative or advocate of his choice is a most valued constitutional right to a litigant. In some cases, however particularly civil cases, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up

as a witness.

2. There is no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by the Court of Appeal is whether real mischief or real prejudice will in all human possibility result"

The court proceeded to set out the principles upon which an advocate may be disqualified from acting for a litigant. This right may be limited in two instances. Firstly where there is a possibility that the advocate may be called as a witness in the case and secondly where there exists a conflict of interest between two clients out of a previous advocate/client fiduciary relationship with the opposing client.

I do agree with **'Mr. Ogola'** that the likelihood that he will be called as a witness in this murder trial is remote. He had not recorded any statement with the police nor have the prosecution given any indication that they intend to summon him as a witness during the trial. As such rule 9 of the Advocates Practice rules would not be applicable. **MS NGOVI** for the prosecution whilst conceding that Mr Ogola was not a potential witness in their case but argued that his representation of the accused person may occasion a breach of the right to confidentiality reasonably expected by the complainants.

In the above cited **Deplhis Case** the court held that although there is no general rule that an advocate cannot act for one party in a matter and then go on to act for the opposing party in subsequent litigation, the advocate may however be barred from so acting when his representation of the new client will result in real prejudice or real mischief against the former client. There is however no hard and fast rule. Each case must be considered on its own merits.

The advocate-client fiduciary relationship places a duty on the advocate not to disclose any information imparted to him during his retainer to a third party without the express consent of a client. This was the decision in the case of **KINGS WOOLEN LTD (formerly known as Machester Suiting Division Ltd) & Another Vs M/s KAPLAN & STRATON ADVOCATES [1993] KLR 273**. Where the Court of Appeal held that:-

"Once a retainer is established then the general principle is that an advocate should not accept instructions to act for two or more clients where there is a conflict of interest between those clients"

Secondly an advocate is under an obligation to zealously represent his client and to this end he is expected to use all the information and skills he possesses to advance his clients interest (or defend his client against a criminal charge). Therefore an advocate must ethically guard against allowing himself to be in a position that would threaten to put at risk his obligation to maintain the professional confidence imparted to him by his former client in the representation of the new client.

Mr. Ogola relied upon the principle of the **'Chinese Wall'**. He submitted that he was not in active practice in his law firm when the complainant retained his partner Mr. Kipkoech. He argued that the mere fact that the two were partners in the firm of **Gordon Ogola & Koech Advocates** did not mean that he would be privy to any relevant confidential information disclosed by the complainant's to his partner.

What is a **'Chinese Wall'** – It is a metaphor which is used to refer to an **"information barrier".**

Professor Finn in "Conflicts of Interest – the Businessman and the Professional" – New Zealand Legal Research Foundation [1987] has defined a **'wall'** as follows

"A wall is an organizational contrivance within an enterprise (read firm of Advocates) designed to prevent the flow of information to or from a part or parts of the enterprise. Its alleged purpose is to prevent it being able to be said that an 'insulated' area of a firm or company has in fact used or will be in a position to use confidential information possessed by another part of the same firm or company"

The idea is that this **'Chinese wall'** would act as a metaphorical barrier which prevents information revealed from one partner flowing to the other partner in a law firm. What is the appropriate test a court should use in determining whether such a **'Chinese Wall'** is in fact an effective barrier to the flow of information from one advocate to another in a manner that would be deemed prejudicial.

This matter was considered in **Re a firm of Solicitors [1992] 1ALL ER 353.** In this case, a company sought an injunction against a firm of 107 partners from acting for a defendant when the firm had previously advised companies associated with it in matters what were closely related to the main action. There was evidence that the solicitors were privy to expert accountant's reports dealing with various allegations of impropriety. Parker, J restricted the test to one of **"reasonable anticipation",** that is, where a reasonable man with knowledge of the facts would reasonably anticipate that there was a danger that information gained while acting for the former client would be used against him or there was a degree of likelihood of mischief.

It was held that:

> ***"There is no absolute bar on a solicitor in a case where one partner in a firm of solicitors has acted for one side and another partner in that firm wishes to act for the other side in litigation..... each case must be considered in as a matter of substance on the facts of each case.... the court will only intervene to stop such a practice if satisfied that the continued acting by one partner against a former client is likely to cause real prejudice.... to the former client".***

Lord Straton expounded that the reasonable man must be in knowledge of all facts including measures proposed to be taken by the firm and show that there is likelihood of breach notwithstanding those measures that are in place. He held that the Chinese wall relevant if there was proof of the existence of adequate mechanisms to protect the flow of information. The Chinese wall would only be relied on in very special cases.

However, English Courts have now adopted a much stricter approach when considering the issue of disqualification of counsel on the need to prevent the breach of the advocate-client privilege. According to the House of lords in **Prince Jefri Bolkiah Vs K.P.M.G (A Firm) [1999] ALL ER 517**

> ***"Although there was no rule that Chinese Walls or other arrangements of a similar kind were insufficient to eliminate the risk the presumption was that, unless special measures were taken, information moved within a firm and, to be effective, those measures had to be an established part of the organizational structure of the firm, not created ad hoc"***

The principles followed by the English Courts were summarised by Clarke LJ in **Koch VS Richards Butler [2002] EWCA Civ 1280** as follows:

> ***1. The court's jurisdiction to intervene is founded on the right of the former client to the protection of his confidential information.***
>
> ***2. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.***
>
> ***3. The duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take reasonable steps to do so.***
>
> ***4. The former client cannot be protected completely from accidental or inadvertent disclosure, but he is entitled to prevent his former solicitor from exposing him to any avoidable risk. This includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information may be relevant.***
>
> ***5. The former client must establish that the defendant solicitors possess confidential information***

which is or might be relevant to the matter and to the disclosure of which he has not consented.

6. The burden then passes to the defendant solicitors to show that there is no risk of disclosure. The court should intervene unless it is satisfied that there is no risk of disclosure. The risk must be a real one, and not merely fanciful or theoretical, but it needs not be substantial.

7. It is wrong in principle to conduct a balancing exercise, if the former client establishes the facts in (5) above, the former client is entitled to an injunction unless the defendant solicitors show that there is no risk of disclosure.

8. In considering whether the solicitors have shown that there is no risk of disclosure, the starting point must be that, unless special measures are taken, information moves within a firm. However, that is only the starting point. The Prince Jefri case does not establish a rule of law that special measures have to be taken to prevent the information passing within a firm.... on the other hand, the courts should restrain the solicitors from acting unless satisfied on the basis of clear and convincing evidence that all effective measures have been taken to ensure that no disclosure will occur. This is a heavy burden.

9. Each case turns on its own facts

Therefore to merely cite the **'Chinese Wall'** principle is not enough. It must be shown that adequate measures have been put in place and exist within the firm to prevent flow of information (even inadvertently) between partners in a firm.

Bearing all the above authorities in mind I then now consider the circumstances of the present case. There is no dispute that the firm of **Gordon Ogola Koech & Co. Advocates** who are now on record for the accused persons were previously engaged by the complainants to watch brief in the same matter (involving the same murder). Undoubtedly in the course of that retainer (by the complainants) confidential information must have been imparted by the complainants to their advocate. I have no doubt that such information is relevant to the present case and if the same is disclosed the complainant will in actual fact be prejudiced. The complainants **have not** consented to the disclosure of that information.

The burden now shifts to **'Mr. Ogola'** to demonstrate that there exist adequate measures in place to protect the flow of that information from his partner to himself.

The fact that the firm has more than one partner, the fact that Mr.Ogola was at the material time not in active practice in his firm, does not in my view provide sufficient assurance that a Chinese wall exists. I take judicial notice of the fact that partners working together in a law firm do meet and hold discussions on daily basis. I have no doubt that they do discuss the briefs which the firm has.

The situation may have been different if the partners worked in the same law firm but in different branches of the firm in different cities. However, in this case both partners work together in the Nakuru Office of the firm.

Whilst I have no doubt that **'Mr. Ogola'** may not intentionally seek to obtain confidential or classified information relayed to his partner by the complainants and in no way do I intend to cast any aspersion whatsoever on **'Mr. Ogola'** or his partner, the test really is whether there exists a **reasonable apprehension** that such confidential information may be revealed even if by mistake, inadvertence or due to human error. The court must be convinced that sufficient measures have been put in place to prevent the advocate in possession of any confidential information from imparting the same to his partner (even in error) **'Mr. Ogola'** is now back in active practice. I have no doubt that he works in close proximity with his partner – they share offices and staff. This is a murder case. It is a serious matter. The nature of the charge is a factor which further serves to persuade me that the application sought is merited. Even the slightest risk of any prejudice or any appearance thereof to any party must be avoided.

For the above reasons I am inclined to allow this application. I order that based on previous interactions

with the complainants the firm of **‘Gordon Ogola & Koech Advocated Ltd’** is hereby disqualified from acting for the accused persons in this murder trial. The accused persons are at liberty to engage another lawyer to act for them.

Dated in Nakuru this 30th day of September, 2016.

Maureen Odero

Judge