



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPLICATION NO. 25 OF 2016

GEOFFREY KIMATHI GICHUNGE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

By the Notice of Motion filed in court on 15/7/2016, **Geoffrey Kimathi Gichunge** prays that the court do order the transfer of Maua CRC 975/2010 Rep v Geoffrey Kimathi Gichunge to any other court other than Maua Law Courts.

The applicant has deposed that he is the accused in CRC 975/2016, but that he has lost confidence in the manner in which the case has been handled by the trial court; that he asked the trial court to disqualify itself and it gave a ruling thereto; that he has civil cases other in the same court where he is the defendant and it relate to the subject matter in the criminal case; that he fears that he will not get a fair trial in that court because the prosecution seems to be colluding with the complainants; that the complaints have a big influence in the said court.

The applicant annexed the ruling by SPM Soita, in which he observed that on 12/5/2016, Hon. Wanyaga PM, recused himself from hearing the matter following a letter written by the applicant and that he too received a letter from the applicant in which he expressed discomfort in the matter being heard in Meru County and Mr. Soita therefore referred the case to this court for its necessary action.

The State did not object to the application because the court in Maua had also not objected.

I have considered the application and the reasons given for the request for transfer of the case. Having perused the lower court file, it is not clear why the applicant wants the courts in Maua or Meru County to recuse themselves from hearing this case. It is not for applicant to chose which court or magistrate to hear him. For the court to recuse itself from hearing a matter on grounds of bias or presumed bias, it behoves the applicant to establish the facts upon which the inference is to be drawn, that a fair minded or informed observer will conclude that the Judge or Magistrate is biased. It is not enough for the applicant just to make bare allegations as seems to have been done in this case. Reasonable grounds must be presented from which the inference of bias can be drawn. Both local and foreign, case law, has set out the principles that are to be considered in such cases where such applications have been made.

In the case of **R v Jackson Mwalulu & Others, the Court of Appeal NRB 310/2004** and **R v David Makali & Others CR APP NAI 4 and 5 of 1995** where Tunoi, JA said:

“The test in objective and the fact constituting bias must be specifically alleged and established. It is my view that where such allegation is made, the court must carefully scrutinize the affidavit

on either side”.

In the above cases, the court emphasized the need for courts to disallow frivolous applications which tend to undermine public confidence in the Judiciary.

In the *President of the Republic of South Africa v The South African Rugby Football Union & Others CCT 16/98*, the court said:

“At the very outset we wish to acknowledge that a litigant and her or his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is counsel’s duty to advance the grounds without fear. On the part of the judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his (or her) recusal as a personal affront.”

In the case of *South African Commercial Catering and Allied Workers Union and Others v Irrin & Johnson Limited Seafoods Division Fish Processing CCT 2/200*, The Judges expressed themselves thus:

“The Test for recusal:

In Sarfu, this court formulated the proper approach to recusal as follows: the question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear or the adjudication of the case that is on mind open to persuasion by the evidence and the submission of counsel.

The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personel, beliefs or predisposition. They must take into account the fact that they have a duty to sit on any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer must not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”

Clearly, in the instant case the applicant never laid basis of any perception or a reasonable basis or foundation for having suspicion or a perception that the magistrate will be biased. In my view, the magistrate should not have been so quick to recuse themselves and abdicate from performing their mandate. They must call on the applicant to substantiate their allegations as seen in the above both local and foreign authorities which apply the same criteria.

Unfortunately, Mr. Soita and Wanyaga have already disqualified themselves from hearing this case. However, that should not be repeated in any other case unless due process is followed otherwise frivolous and vexatious applicants will use such tricks to undermine public confidence in the Judiciary and the dignity and independence of the court and will also use such applications to shop for what would appear to them to be favourable judges or magistrates.

Having said the above, I direct that Maua CRC 975/2010 be and is hereby transferred to CM’s Court, Meru for hearing and determination. The matter be mentioned before the CM, Meru on 31/10/2016 for directions as to the hearing.

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF OCTOBER, 2016.

R.P.V. WENDOH

JUDGE

24/10/2016

In the Presence of:

Mr. Mulochi for State

Court Assistant, Peninah

Applicant, Present in Person