REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION NO. 82 OF 2013

BARNABA KIPSONGOK TENAI …..... APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

RULING

The application for determination is the Notice of Motion dated 23rd September, 2013 brought under Article 22 and 50 of the Constitution of Kenya and Section 81 of the Criminal Procedure Code and all other enabling provisions of the law.

The Applicant prays for the following orders:-

1. ***That the Honourable Court be pleased to order that matter be heard and determined in a different and/or another court.***

2. ***The Honouarable Court be pleased to issue such orders as may be fair and just to secure the applicant's Rights to a fair and just trial.***

The application is premised on the following frounds:-

(a) The Applicant was arraigned in court on 27th May, 2008.

(b) On 6th June the Applicant was released in bond of Ksh. 200,000/= with surety of similar amount.

(c) The Applicant was on bond/bail until 17th September, 2012 when the trial Magistrate cancelled the bail/bond.

(d) The Applicant's bail/bond terms were reinstated and/or revised on 1st November, 2012 vide High Court Misc. Criminal Application No.137 of 2012 ruling.

(e) The Applicant feels the trial Magistrate breached his fundamental rights by cancelling the bail terms despite valid reasons given before the Honourable Court.

(f) The Applicant does not have any more trust in the trial court following the way it handled the matter by cancelling the bail/bond terms.

It is further supported by the affidavit of the Applicant, Barnabas Kipsongok Tenai sworn on 23rd September, 2013. The gist of the Supporting Affidavit is that on 22nd August, 2012, his crucial

trial at Eldoret Chief Magistrate's Court Criminal Case No. 1871/2008 failed to proceed because the trial Magistrate was participating in judicial marches. He was informed by the trial court's Court Clerk to return to court on 17th September, 2012 for defence hearing. On the latter date, he also had another criminal trial at the Kapsabet Law Courts. He opted to go to Kapsabet Law Courts but forgot to infrom his Lawyer to be in attendance at Eldoret Law Courts. The trial court cancelled his bond but the same was reinstated by the High Court in its ruling vide **HIGH COURT MISCELLANEOUS CRIMINAL APPLICATION NO. 137 OF 2012**. On 9th October, 2012, the Applicant attended court, and through his advocate, he tendered an apology but the trial court did not reinstate his bond. He feels that the trial court is biased against himself and justice cannot be done if the matter is heard and conducted by the same court.

The application was canvassed before me on 3rd April, 2014. Mr. Omwenga advocate represented the Applicant while learned State Counsel, Miss Ruto appeared for the Respondent.

Miss Ruto did not oppose the application. In her own words, she submitted that for justice to be seen to be done, the criminal trial should be heard by another Magistrate other than the current trial Magistrate. She also stated that there was a likelihood of a miscarriage of justice on grounds that are personal between the counsel for the Applicant and the trial Magistrate.

Mr. Omwenga reiterated the contents of the Supporting Affidavit. He added that the trial Magistrate has exhibited open bias against the accused. That after the bond was reinstated, the Applicant and his lawyer resumed the trial before the trial Magistrate in good faith. That it seemed that the trial Magistrate was not happy that the High Court had granted the Applicant bond. That as a result of the exhibited bias against the Applicant, Counsel for the Applicant made an application that the trial Magistrate Hon. Dolphine Alego disqualifies herself from the matter.

Mr. Omwenga submitted that the learned trial Magistrate directed that a formal application be made and when the same was filed she referrred it to the Chief Magistrate for directions. The Chief directed that it be head by herself.

The Applicant and his counsel were to be heard on 20th May, 2013. Mr. Omwenga stated that the trial Magistrate turned hostile towards him. She started quarrelling her in open court for 20 minutes for no apparent reason. She told him that he had been seen at the Judges and Magistrates Vetting Board. Mr. Omwenga confirmed that indeed he had appeared before the Board but he was representing the Law Society of Kenya. He submitted that the Applicant's application was finally heard and dismissed.

It was Mr. Omwenga's view that, in view of the trial Magistrate's attitude and behaviour, she cannot be deemed as impartial and if the trial continues before her, there was a likelihood of a miscarriage of justice.

He urged this court to protect the image of the Judiciary by ordering that the trial be heard by another Magistrate.

I have now appraised myself with the application and the submissions made by the learned counsel for the Applicant. There is only one issue for determination; being whether the trial Magistrate has exhibited bias against the Applicant and by and large his lawyer to warrant a transfer of the criminal trial from her court.

The application is basically brought under Articles 22 and 50 of the Constitution and Section 81 of the Criminal Procedure Code. Article 22 provides for the enforcement of the Bill of Rights; that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed. In the instant case, the Applicant's case is that his right to a fair hearing has been infringed or is likely to be infringed if the trial continues before a Magistrate who has exhibited open bias against him.

Article 50 is broad and provides for the components of the right to a fair hearing, which the Applicant argued is likely to be infringed.

It is important that I duplicate both Articles 22 and 50 of the Constitution in this ruling. They read as follows:-

"22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that-

(a) the rights of standing provided for in clause(2) are fully facilitated;

(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

(c) no fee may be charged for commencing the proceedings;

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and

(e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

(4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court."

"50 (1) 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) Every accused person has the right to a fair trial, which includes the right -

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at the State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

(i) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

(m) to have assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not-

(i) an offence in Kenya; or

(ii) a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the ofence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

(3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.

(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

(5) An accused person-

(a) charged with an offence, other than an offence that the court may try by summary procedures, is entitlted during the trial to a copy of the record of the proceedings of the trial on request; and

(b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.

(6) A person who is convicted of a criminal offence may petition the High Court for a new trial if-

(a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and

(b) new and compelling evidence has become available.

(7) In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.

(8) This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.

(9) Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences."

Section 81 of the Criminal Procedure Code on the other hand provides as follows:-

"81. (1) Whenever it is made to appear to the High Court -

(a) that a fair and impartial trial cannot be had in any criminal court subordinate thereto; or

(b) that some question of law of unusual difficulty is likely take arise; or

(c) that a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the offence; or

(d) that an order under this section will tend to the general convenience of the parties or witnesses; or

(e) that such an order is expedient for the ends of justice or is required by any provision of this Code,

it may order -

(i) that an offence be tried by a court not empowered under the preceding sections of this Part but in other respects competent to try the offence;

(ii) that a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction;

(iii) that an accused person be committed for trial to itself.

(2) The High Court may act on the report of the lower court, or on the application of a party interested, or on its own initiative.

(3) Every application for the exercise of the power confered by this section shall be made by motion, which shall, except when the applicant is the Director of Public Prosecutions, be supported by affidavit.

(4) An accused person making any such application shall give to the Director of Public Prosecutions notice in writing of the application, together with a copy of the grounds on which it is made, and no order shall be made on merits of the application unless at least twenty-four hours have elapsed between the giving of notice and the hearing of the application.

(5) When an accused person makes any such application,the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the costs of the prosecutor."

I find Article 50 (1) of the Constitution as the pillar on which this application stands, that, ***"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"***. Then the question flows; *has the trial Magistrate exhibited bias that is likely to compromise a fair and impartial trial?*

In the Supplementary Affidavit also sworn by the Applicant on 25th February, 2014, the Applicant deponed that the altercation that ensued between his counsel and the learned trial Magistrate, Hon. Dolphina Alego on 20th May, 2013 for 20 minutes was about a personal grievance that the Honourable Magistrate had against his counsel. That despite his advocate's plea that the personal scores be privately settled in Chambers, the trial Magistrate insisted that the application seeking that she recuses herself from the trial be heard in an open court. The said application was however dismissed prompting the Applicant to move to the High Court in the instant application.

The Black's Law Dictionary, 8th Edition at page 171 defines the word bias as;

"Inclination; prejudice, …., judicial bias. A Judge's bias toward one or more of the parties to a case over which the Judge presides. Judicial bias is usually insufficient to justify disqualifying a Judge from presiding over a case. To justify disqualification or recusal, the Judge's bias usually must be personall or based on some extra judicial reason."

While the same dictionary at page 1303 defines recusal as;

"Removal of oneself as Judge or policy-maker in a particular matter because of a conflict of interest."

The Applicant herein seeks that the trial Magistrate recuses herself from the criminal case due to her open bias against the Applicant. The issue of recusal of judicial officers from matters owing to their alleged bias in a particular case has been addressed in various case law.

In the case of **JASBIR SINGH RAI & 3 OTHERS -VS- TARLOCHAN SINGH RAI & 4 OTHERS (2013) @ KLR,** Supreme Court of Kenya Petition No. 4 of 2012 Hon. Justices P. K. Tunoi, J. B. Ojwang, N. S. Ndungu, M. K. Ibrahim and S. Wanjala (JJSC) had this to say;

"(6) Recusal as a general principle, has been much practised in the history of the 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, 8th Edition (2004) (P. 1303);

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

[7] From this 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 the 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 had 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. This is what Sir David Maxwell Fyfe meant when he attributed to Lord Atkin a "constructive intuition which operates after learning and analysis are exhausted" [in G. Lewis, Lord Atkin (London: Butterworths, 1983), p. 166]. It is precisely such delicate elements of judicial fairness that will also feature in the judgment as to whether or not the recusal of a Judge, particularly in the case of a collegiate Bench, is of any materiality, in a given case.

[9] Different jurisdictions make provisions, through statute or practice directions, for certain grounds for the recusal or disqualification of Judges hearing matters in Court. The most common examples, in this regard are: where the judicial officer is a party; or related to a party; or is a material witness; or has a financial interest in the outcome of the case; or had previously acted as counsel for a party.

[10] ***In R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte*** **Pinochet Ugarte (No.1) [2000] 1 A.C. 6, the English House of Lords [now the Supreme Court] had just rendered a judgment when it became known that a member of the collegiate Bench involved, was an unpaid director and chairman of Amnesty International Charity Limited, an organization set up and controlled by Amnesty International; and the same member's wife was also employed by Amnesty International. In the said judgment, it had been held that General Pinochet, the Chilean Head of State, was not immune from arrest and extradition, in relation to crimes against humanity which he was alleged to have committed while in office. The House of Lords, at the commencement of the hearing, had given permission for Amnesty International to join in as intervener. A newly constituted Bench of five Judges held unanimously that the earlier judgment must be set aside, because one of the members of the Bench should have been disqualified from hearing the case; as that member had had an interest in the outcome of the proceedings.**

[11] In an American case, *Perry v. Schwarzenegger,* 671 F. 3d 1052 (9th Circ. February 7, 2012) it was held that the test for establishing a Judge's impartiality is the perception of a *reasonable person,* this being a "well-informed, thoughtful observer who understands all the facts", and who has "examined the record and the law"; and thus, "unsubstantiated suspicion of personal bias or prejudice" will not suffice.

[12] Such a broad test is adopted too in *South African Defence Force and Others v. Monnig and Others* (1992) (3) SA 482 (A), p.491: *"The recusal right is derived from one of a number of rules of natural justice designed to ensure that a person accused before a court of law should have a fair trial."*

In the foregoing case, the learned judge of the Supreme Court of Kenya Ibrahim JSC observed as follows;

"The issue of the circumstances under which a judge may be required to recuse himself has been explained by the elaborate decisions of the courts made over the years which go as far back as the 19th century when the House of Lords in Dimes vs Proprietors of Grand Junction Canal***, set aside Lord Chancellor Cottenham's decision in the case on the ground that he had a pecuniary interest in the matter by virtue of the fact that he had a substantial shareholding in Grand Junction Canal. The Court set aside that decision and held that Cottenham LC was disqualified.***

This is supported by the commonly cited holding of Lord Hewart CJ in *R vs Sussex,*

ex parte McCarthy **that *"it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."***

In *R vs Bow Street Metropolitan Stipendiary Magistrate & Others Ex perte Pinochet Ugarte*the House of Lords in explaining the circumstances under which the Court applies the principle observed that where a judge does not have a direct pecuniary or proprietary interest in the outcome of the matter but in some other way his conduct may give rise to a suspicion that he is not impartial the principle applies.

The Court noted that it was faced with a novel case since the disqualification was sought on grounds which did not indicate any person would get any pecuniary interest out of the decision of the Court since the matter was a criminal case. It opined:

"[t]he rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge is involved together with one of the parties."

Further, the Court explained that it is only in exceptional circumstances as in this case *"should a judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest."*

Lord Nolan in concurring with the decision of Lord Browne-Wilkinson and Lord Goff in *Ex parte Pinochet* stated that *"in any case where the impartiality of a judge is in question*

Similarly, Lord Hutton observed that if the nature of the interest was such that public confidence in the administration of justice required that the judge implicated disqualifies himself, it was irrelevant that there was in fact no bias on the part of the judge, and there is no question of investigating whether there was any likelihood of bias or any reasonable suspicion of bias on the fact of that particular case.

In *Sellar vs Highland Rly Co.*the Court emphasized on the need to preserve the principle as much as possible. Lord Buckmaster stated that the rule was one that he would *"greatly regret to see even in the slightest degree relaxed."* He added that *"the importance of preserving the administration of justice from anything which can even by remote imagination infer a bias or interest in the Judge upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured."*

These precedents clearly indicate the weight with which the principle has been held by the Courts and the extent to which the Courts will jealously guard it. Even if it results in some inconvenience on the part of the Court it would be gladly borne for justice to prevail.

In *R vs Gough* [1993] 2 All E. R 724, [1993] AC 646 **Lord Goff of Chieveley observed that:**

"[T]he nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of the impartiality."

The Court must therefore, take into consideration the impact that the failure of the judge to disqualify himself will have on the public concerning their perception of the process of administration of justice". (See Jasbir Singh Rai & 3 Others V Tarlochan

Singh Rai & 4 Others, as per Ibrahim JSC.)

In testing as to whether an issue at hand is worthy recusal, the learned judge Ibrahim JSC, in the case of ***Jasbir Singh Rai & 3 Others V Tarlochan Singh Rai & 4 Others*** had this to say.

"The Test **Lord Justice Edmund Davis in *Metropolitan* Properties Co. (FGC) Ltd. Vs Lannon [1969] 1 QB 577 stated that disqualification was imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias. Acker LJ in *R vs Liverpool City Justices, ex parte Topping* [1983] 1 WLR 119 elaborated on the test applicable. The Court has to address its mind to the question as to whether a reasonable and fair- minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable.**

In an article by a writer, Holly Stout (11 KBW) on the subject of "Bias', the author states:

'… The test to be applied by a judge who recognizes a possible apparent bias is thus a "double real possibility" test; the question he/she must ask him/herself is whether or not there is a real possibility that fair-minded and informed observer might think that there was a real possibility of bias." (referred to PORTER –V- MAGILL (2002) 2 AC 357)."

*In the case of **Republic v Mwalulu & 8 Others [2005] eKLR , In the Court of Appeal Civil Application No. Nai 310 of 2004 (159/2004 UR),** the learned judges Omolo, Tunoi, JJ.A & Deverell AG. J.A), delivered themselves as follows;*

"The principles on which a judge would disqualify himself or herself are well known... The Court itself has applied them in various cases such as

REPUBLIC Vs. DAVID MAKALI & 3 OTHERS , Criminal Application Nos. NAI 4 & 5 of 1994 (unreported) and in KIMANI Vs. KIMANI reported in the [1995 – 1998] 1 EA 134. In the MAKALI case TUNOI JA who dealt with the issue of disqualification in his judgment, having cited the well-known proposition of LORD DENNING, M.R in the English case of METROPOLITAN PROPERTIES CO. (FG.C) LTD. Vs. LANNON & OTHERS (1969) 1 Q.B. 577, proceeded to summarize the legal position in Kenya as follows: -

"That being the position as I see it when the courts, in this country are faced with such proceedings as these, [i.e. proceedings for the disqualification of a judge] it is necessary to consider whether there is a reasonable ground for assuming thepossibility of a bias and whether it is likely to produce in th e

minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established. It is my view that where any such allegation is made , the court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their cases before a court or quasi -judicial tribunal, they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the Judge, Magistrate or Tribunal."

These remarks by TUNOI, JA which basically applied Lord Denning's

principles in the LANNON case, were made in a case involving contempt of court. The same principles were applied with equal force in the KIMANI Vs. KIMANI case and thatwas a dispute between a man and his wife over property acquired during the subsistence of a marriage which was subsequently dissolved. That the same principles are applied over such wide ranging fields only goes to show how widely accepted they are so that

in dealing with the issue of disqualification of a judge or any other judicial or quasi-judicial officer on the ground of alleged bias, the court hearing the matter is not, indeed it cannot, go into the

question of whether the officer is or will be actually biased. All the court can do is to carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair- minded person would do, that the judge is biased or is likely to be biased. Again, as TUNOI J.A pointed out, sight must not be lost of the fact that losing litigants might be more inclined to explain their loss on the alleged wickedness of other people rather than on the weakness of their own case. It is these considerations that have led to injunctions such as that judges ought not to be too ready to disqualify themselves lest there be found no judge available to deal with certain types of cases, particularly those involving parties who are constantly in the courts over one sort of dispute or another".

In the case of ***Patrick Ndegwa Warungu Vs. Republic in the High Court at Milimani Criminal Application No. 440 Of 2003*** Ombija J. on refusing to grant the transfer of the matter from one judicia officer to another in the Magistrate Court observed as follows;

"The principles upon which transfer may be granted has been crystallized in several authorities the leading one being SHILENJE v THE REPUBLIC [1980] KLR 132 which lays down the law that for the High Court to order a transfer there must be reasonable apprehension in the applicant's or any right thinking person's mind that a fair and impartial trial might not be had before the magistrate whether one takes the incidences individually or collectively. Concomitantly there must be something before the court to make it appear that it is expedient for the ends of justice that an order for transfer ought to be made.

I derive much help froim Sir H.T. Trinsep and Sir John Wrodroffes i.e. the former's commentary and Notes (14th Edition) (1906) and the later's Criminal Procedure in Briston India (1926). The principles which come out clearly are that the High Court will always require some strong grounds for transferring a case from one judicial officer to another. The court has to consider whether there has been any real bias in the mind of the presiding judge and/or magistrate and also whether incidences have happened which might create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial. Whether such apprehension is reasonable must be determined with reference to the mind of the court rather than the mind of the accused. On the evidence before me, in light of the provision of section 87 of the Criminal Procedure Code, I take the view that the withdrawal of the applicant's bond on allegations of the complainant does not constitute enough reason to transfer the case bearing in mind the fact that the magistrate after the result of the investigation reinstated the applicant's bond.

That speaks well of the magistrate. It is a clear evidence of impartiality and proper administration of justice. Equally on the evidence before me, I am not prepared to hold that the magistrate rejection of the complainant's

application does constitute bias when seen against the background that previously (in the same court) the complainant had withdrawn the case involving the complainant and in less than a month the same parties were

back in court seeking reinstatement of the charge and continuation of the case to its logical conclusion.

Whether one takes the two incidences individually or collectively there is no evidence to chow that the magistrate is in any way partial or unfair. Finally there is nothing before me to make it appear that it is expedient for the ends of justice that an order for transfer ought to be made".

The foregoing case can be distinguished from the instant scenario as follows; unlike in the above cited case, the trial magistrate in the instant case declined to reinstate the canceled bond prompting the Applicant to seek redress in the High Court vide Misc Criminal Application No. 137 of 2012 in which the High Court reinstated the same. Secondly unlike in the said Patrick Ndegwa Warungu case, in the instant case, it appears that the Applicant's counsel and the honourable magistrate Dolphina Alego P.M have personal differences that were exhibited at the hearing of the application

for her recusal. I say so because, after the altercation between the Applicant's counsel and the learned trial Magistrate, it was evident that there existed personal differences between both of them. Good counsel should have ultimately prevailed on the part of the court that it was not likely that things would flow normally. Indeed, the perception of personal bias was the end result after this incident and the learned trial Magistrate ought not have insisted on hearing the application for her recusal. This is so because, even if the outcome of the said application was merited, the likelihood that ends of justice would appear to have been done was next to naught. Unfortunately, and as fate had it, the application was dismissed which led to the confirmed fear by the Applicant, that indeed the Magistrate was biased against him. As the word 'bias' is defined, it must be demonstrated that the acts or omissions levelled against the officer must be personal, in this case, the fact that the learned Magistrate and the Applicant's counsel had an altercation is indicative that personal bias was likely to follow in the proceedings in the trial. And so, this is a clear case in which the Applicant should succeed in his quest to have the case transferred from the current trial Magistrate.

The test for transfer was clearly elaborated in the case of *Kinyatti v Republic [1984] e KLR, Court of Appeal, at Nairobi Criminal Appeal No 60 of 1983*, the learned Judges Kneller JA, Chesoni & Nyarangi Ag JJA while elaborating on the provisions of section 81 of the Criminal Procedure Code, supra,delivered themselves at length as follows;

We were urged to be persuaded by the Tanzanian case of Republic v Hashimu [1961] E A 656. That case was decided on the principles applicable to section 80 of the Tanzanian Criminal Procedure Code (cap 16) which is theequivalent of our section 81 and not on the Tanzanian equivalent of our section 79. It was a case where it was sought to effect a transfer by the High Court and not by a subordinate court. In the former the grounds on which the transfer may be effected are limited to these specified in the section whereas under our section 70 there is no limit to the grounds upon which the application for a transfer may be made and granted or refused. The appellant's application gave a specific reason and that is that the court had heard similar cases before in which the same witnesses as those who were likely to testify in this case had given evidence and been commented on by the court as being truthful.

In Hashimu ibid the Tanzania High Court (Saidi J) held that the accused person ie the applicant, must make out a clear case before a transfer of any trial is granted on his application and the apprehension in his mind that he will not have a fair and impartial trial before the magistrate from whom he wants the trial transferred must be reasonable. Two High Court of Kenya Judges adopted what was said in Hashimu (Sachdeva J) in Francis Henry Karanja v Republic HC Cr application No 107 of 1976 (unreported) andTravelyan J in John Brown Shileuje v Republic HC Cr Application No 180 of 1980 (unreported). All these cases have not departed from what Hamilton CJ said in the matter of an application by MS Patel, (1913/1914)5 KLR 66, Patel, who was an advocate of the High Court of East Africa practicing at Lamu was summoned before the town magistrate at Lamu for assaulting his servant. Before the hearing he notified the magistrate that he intended to apply to the High Court for a transfer of his case to some other court under section 526 of the Criminal Procedure Code of the time. The magistrate proceeded to hear the case and Patel made his application. One of the matters, among others, he alleged in the affidavit in support of the application was that the magistrate sent for the applicant in chambers and told him he considered the application an insult to the court and urged him to withdraw it, warning him that the result would be serious if he persisted with it. The applicant urged that he had formed a reasonable apprehension in his mind that the magistrate had formed an opinion adverse to his case.It was held that the true test for making an order for transfer was not whether or not the magistrate was biased but whether a reasonable apprehension existed in the mind of the accused from incidents which had occurred that he may not have a fair and impartial trial. A transfer was ordered. Hamilton CJ quoting the Calcutta High Court decision in Dupeyron v Driver I L R XXIII Cal 495 said at p68;

"I am not here concerned with an issue as to whether the magistrate was in fact likely to be partial or impartial and to believe that the accused would have received I am perfectly prepared to

believe that the accused have received a fair trial at his hands. But the test to be applied in such cases as this has been settled in various cases in Indian courts and I would refer particularly to the judgment of the Calcutta High Court in Dupeyron v Driver ……where the judges say:

Where the apprehension in the mind of the accused that he may not have a fair and impartial trial is of a reasonable character, there, notwithstanding that there may be no real bias in the matter, the facts of incidents having taken place calculated to raise such reasonable apprehension ought to be ground for allowing a transfer." The Patel case has withstood the test of time and in our view is still the law on the question of the transfer of a criminal case on application by the accused person. It is not the strength of the ground as stated in the Indian Code of Criminal Procedure 1908 by Sir HT Prinsep and Sir John Woodroffe that weighs with a court but the reasonableness of the accused person's apprehension. If the accused shows that his apprehension is reasonable then he has set out a clear case. Mr Chunga accepted the test laid down in Hashimu.

The grounds given by the Chief Magistrate in refusing a transfer were far from the established test. It was immaterial whether there would result chaos in the administration of courts; it was further irrelevant whether the Chief Magistrate dealt with many similar cases involving the same witnesses and whether he was sufficiently experienced so as to decide the case dispassionately. The test was whether the apprehension in the mind of the applicant/accused that he may not have a fair and impartial trial before the Chief Magistrate was of a reasonable character regardless of the fact that there may be no unfair or partial or biased trial in the matter. That was the test the trial magistrate ought to have applied.

In conclusion, the facts of this case speak for themselves. The trial Magistrate by openly quarrelling the Applicant's Counsel on matters not related to the trial before her was a clear signal that she was angry or bitter with him. This set the stage for the perception that the ends of justice would not be met; that justice would not prevail. It is my view that the Applicant's fear that justice would be vitiated due to the exhibited bias by the Hon. Magistrate was real. It was clear that fairness in the administration of justice would not prevail and that the trial was unlikely to proceed in an impartial manner.

In the result, and taking into account the circumstances under which this application is brought, I have no shred of doubt that the Criminal Case No. 1871 of 2008 pending before the Chief Magistrate's Court in Eldoret and being tried by Hon. Dophina Alego, Principal Magistrate should be transferred for hearing before another Magistrate with competent jurisdiction. This way, justice will not only be done but be seen to be done.

Accordingly, I order the file in Criminal Case No. 1871 of 2008 be mentioned before the Chief Magistrate (Court No. 1) on 28th July, 2014 in the presence of the Applicant for purposes of allocating it for trial before another Magistrate who has competent jurisdiction to handle it. I give no orders as to costs of this application.

DATED and **DELIVERED** at **ELDORET** this 23rd day of July, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Miss Omwansa holding brief for Omwenga for the Applicant/Accused

Miss Mwaniki for the Respondent/State