



No. 443/2014

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
IN THE MATTER OF THE CHIEF MAGISTRATE'S
CRIMINAL CASE NO. 494 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

SAMSON SINKEET SIRONKA.....1ST ACCUSED

SOLOMON NTINI OLOISHORUA.....2ND ACCUSED

WILFRED NYANDORO NYABERE.....3RD ACCUSED

RULING

1. This matter has been placed before me by the **Deputy Registrar Machakos High Court, Ms. Makungu** following a ruling dated the **20th August 2014** by **Gesora P.N. Senior Principal Magistrate**.

2. In the aforesaid ruling the learned magistrate was of the view that the High Court peruses the file in exercise of its supervisory jurisdiction to enable it give directions in the matter.

3. The learned trial magistrate made the ruling following an application made on the **20th August, 2014** by the 1st and 2nd accused persons' counsel **Mr. Oronga** (holding brief for Mr. Nyandieka) requiring him to recuse himself from hearing the case.

4. The basis of the application was reduced into an affidavit deposed by **Solomon Ntini Oloishorua**. At paragraphs **5, 6, 7 and 8**.

He deposed that:

“5. THAT I aver that upon reading the proceedings, I discovered to my dismay that the trial Magistrate herein did not record the proceedings in an impartial manner. There appear on the face of the record bias, by the very deliberate omissions of very vital evidence against the prosecution's case and in support of the innocence of the accused.

6. THAT whereas my advocate on record proceeded to prepare written submissions and filed the same in court, I being aggrieved by the misconduct of impartiality in this matter by the Trial Court, did proceed

on the 28th February 2014 to the Judges and Magistrates Vetting Board where I recorded my complaint against the Trial Magistrate in this matter, the Honourable Mr. Gesora, Principal Magistrate.

7. THAT the Judges and Magistrates Vetting Board allowed me to record a statement over my complaint and advised me that they would call me as a witness when the trial Magistrate would be summoned for vetting, which was said to be awaiting the amendment of the Judges and Magistrates Vetting Act. I was also advised to inform my advocate over the same.

8. THAT the evidence deliberately left out by the Trial Court in favour of the complainant include the following namely:

a. The Trial Court deliberately shielded the complainant to the disadvantage of the accused by not indicating that when the complainant was cross-examined as to whether he owned any piece of land measuring approximately 10 acres that initially was owned by Tutayo Leiyio Lenkoko, the owner of the subject land that the complainant claims was being sold by the accused to him, the complainant denied vehemently until my advocate asked for a short adjournment, sent me to his car, I picked a certified copy of the green card for title number Kajiado/Kaputiei North 23548. The complainant changed his testimony and accepted to have owned that land three years before the alleged offences herein. This denial, and change of testimony is not reflected in the evidence.

b. Further the Trial Court did not indicate the answer given by the complainant on cross examination as to why he transferred a sum of Kshs.400,000/= from his account to the account of the said Tutayo, to which he answered that it was a balance towards assistance of Tutayo in sorting out the subject land dispute at the Kajiado Land Disputes Tribunal.

c. Further the Court deliberately omitted evidence of PW5 Peter Mutua Maithya the manager with Kencom Sacco Society Limited, when he pointed that the complainant was on the ground as part of the vendors selling the subject property that we are accused of having falsely pretended to the complainant of selling the same to him.

d. The Trial Court did not capture the essence of the question put to the complainant and his answer as to a witness statement he has recorded in another matter making reference to the instant case where the complainant has stated that he was surprised to meet a lady (Tutayo Leiyio Lenkoko) claiming to be the owner of the subject land herein.

e. The above are some of the deliberate omissions made by the Trial Court, to shield the complainant as against the accused.”

5. The Constitution of Kenya guarantees an accused person the right to fair trial. The rules of natural justice would require an accused to be tried by an impartial court. In order for a judicial officer to recuse himself/herself from a matter there ought to be a reasonable apprehension by the person seeking an order of disqualification that the judicial officer has personal bias and prejudice concerning him.

6. In the case of **Kinyatti versus Republic Criminal Appeal No. 60 of 1983** the court of Appeal held:

“A trial magistrate...has the discretion, not to participate at a trial when the circumstances are such that bias might be suggested. However, that discretion must be exercised judicially and on the proper principles...”

7. In his ruling the learned trial magistrate stated that allegations had been leveled against his person and conduct but he did not exercise his discretion to either disqualify himself from the matter or decline to so. Instead he called upon the High Court to exercise its discretion in that regard.

8. The High Court would exercise its supervisory jurisdiction over the subordinate court when it is necessary to correct an order made. In such a case it would have to satisfy itself of the legality, correctness or propriety of any finding or order recorded. (See **Sections 362 and 363 of the Criminal**

Procedure Code.) In the instant case the magistrate having not made a decision, there is nothing to correct.

9. According to the provisions of **Section 81(2)** of the **Criminal Procedure Code** the High Court may act on its own motion; or the report of the lower court or following an application by a party by ordering transfer of a case. What informs the High Court to act is if it appears that a fair and impartial trial cannot happen. It must also satisfy itself that the order made will be expedient for the end of justice. (See **Section 81(1) (a) and (e) of the Criminal Procedure Code**).

10. The **Hon. Gesora P.N.** was transferred from **Machakos Law Courts** to **Naivasha Law Courts**. He ceased to exercise jurisdiction within **Machakos Law Courts** on **14th** day of **April 2014**. However, he was granted authority to return to **Machakos Law Courts** to hear and determine some cases on the **18th August 2014**; this particular case being one of them. According to the letter authored by the Registrar Magistrates Court, he had three (3) days within which to “hear and finalize” the matter. The matter having not been concluded within the specified period, unless the Registrar intends to enlarge time within which the magistrate should determine it; the case would have to proceed pursuant to the provisions of **Section 200(3)** of the **Criminal Procedure Code**.

11. In the premises I direct the **Chief Magistrate** in charge of **Machakos Law Courts** to take up the matter and act in accordance with the law.

12. It is so ordered.

DATED, SIGNED and DELIVERED at **MACHAKOS** this **19TH** day of **NOVEMBER, 2014**.

L.N. MUTENDE

JUDGE