Muchiri v Republic (Criminal Appeal E119 of 2023)
[2024] KEHC 11803 (KLR) (4 October 2024) (Judgment)

Neutral citation: [2024] KEHC 11803 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E119 OF 2023

RC RUTTO, J

OCTOBER 4, 2024

BETWEEN

MICHAEL MAINA MUCHIRI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Ruling of Hon. R. N. Nganga SRM, in Criminal Case No. E042 of 2022 made on 29/6/2023)

JUDGMENT

1. The appellant being aggrieved by the Ruling of the trial court made on 29/6/2023 in Gatundu Magistrate's Court Criminal Case No. E042 of 2022 preferred this appeal. The ruling is as a result of an application by the Appellant in which he sought that the trial court recuses itself in the matter on the grounds that he was convinced that he will not receive a fair hearing before the trial court. The Appellant seek orders that; -

    a. The Honourable Magistrate erred in law and fact for delivering the ruling on 29/6/2023 without according the Appellant an opportunity to file his submissions.

    b. The Honourable court erred in law and fact in dismissing the Application dated 24th March 2023 on account that the grounds raised for recusal did not warrant recusal of the trial court.

    c. The Honourable Magistrate erred in law and fact in finding that the accused person has a case to answer without giving any reasons for that finding.

    d. Any other relief as the Honourable court may deem fit and just to grant in the circumstances of this appeal.

2. Pursuant to the directions of this court issued on 14th June 2024, the Appellant filed his submissions dated 19th June, 2024. At the time of writing this judgment, the court could not find the respondent's submissions on the record or on the CTS.

Appellant's submissions

3. The appellant delimited the following issues in his submissions: whether the appellant was accorded an opportunity to file submissions before delivery of ruling dated 29th June 2023; whether the trial court gave reasons for finding the accused person to have a case to answer; and whether the application dated 24th March raised sufficient grounds for recusal of the trial court.

4. The appellant submitted that he was never accorded an opportunity to file his submissions on whether he had a case to answer before delivery of the ruling dated 29th June 2023. That on 21st November 2022, the prosecution closed its case and the appellant elected to file submissions. That on 16 February 2023 he was issued with proceedings which were not proof read and when he got the proof read, they were not a true reflection of the events that transpired during hearing of the prosecution case and hence he could not prepare his submissions.

5. The appellant also faults the trial court for delivering a ruling on stay of proceedings and on a case to answer on 29th June 2023, yet the date was reserved for mention and not ruling. That this affected the delivery of justice to the accused person. That this action constructively denied him the opportunity to file his submissions.

6. The Appellant further submits that he had a legitimate expectation that the court, in delivering a ruling on the application dated 24th March 2023, would address only the issues of the application and not the matter of whether he has a case to answer. As a result, he was denied the opportunity to file his submissions on whether or not he has a case to answer.

7. On the issue of whether the trial court provided reasons for finding that the accused person had a case to answer, the Appellant submitted that, on 29/6/2023, the court established that a prima facie case had been made out against him, requiring him to present a defense. However, no reasons or explanations were provided for this finding. He relied on Section 211(1) of the *Criminal Procedure Code* and a paper presented by Hon. Justice Lee G. Muthoga during the Induction Training Course for newly appointed Judges of the High Court of Kenya on 18th October 2012, which quoted the Guidelines for Judgment Drafting, emphasizing that a finding must be expressed in clear and communicative language.

8. On the issue of whether the Application dated 24th March 2023 raised sufficient grounds for the recusal of the trial court, the Appellant relies on Regulation 21 of the *Judicial Service Code of Conduct and Ethics Regulations, 2020*. He submits that the trial court failed to address the issue of prejudice and did not fully appreciate that the Appellant only became aware of the prejudice or bias after being served with the proceedings. Thus, raising the issue at that stage was the earliest opportunity to address his concerns.

9. In conclusion, the Appellant prays that the matter be referred to the Senior Principal Magistrate & Head of Station for directions regarding the reallocation of this matter to a different trial court.

Analysis and Determination

10. I have carefully considered the Appellant's submissions and the impugned ruling of the honourable learned magistrate delivered on 29/6/2023 and which is the subject of the appeal. The only issue for determination is whether this appeal has merit or not.

11. Outrightly, I would like to dispense with a preliminary issue. I have noted that the orders sought in the appeal dated 4th October, 2023 comprise of grounds of the appeal only but no consequent orders. In his submissions the Appellant prays for an order to have this matter returned to the Senior Principal Magistrate & Head of Station for directions as to re-allocation of this matter to a different trial court.

12. It is a principle of law that parties are generally bound and confined to their pleadings unless pleadings are amended during the hearing of a case. The pleadings must be logical and intelligible. The lack of a specified prayer in the petition of appeal is not proper. However, guided by Article 159(2)(d) of the *Constitution* that calls for focus on substantive justice, I will consider the appeal on its merits given that the Appellant is unrepresented and might not be very conversant with the rules of drafting of pleadings. It is also clear that his plea before this Court can be discerned from his submissions as outlined above.

13. The Appellant was charged before the Gatundu Magistrate's Court in Criminal Case Number E042 of 2022 with the offence of forcible detainer contrary to section 91 of the *Penal Code*. He took plea on 17/1/2022 when he pleaded not guilty to the charges and the matter was set down for hearing. On 13/7/2022, PW1 testified and was cross examined but before cross examination was concluded, PW1 was stood down and the court directed that a date be set for a site visit.

14. On 25/7/2022, the court proceeded for a site visit with the appellant present. On 21/11/2022 PW1 cross-examination proceeded and 5 other witnesses gave their testimony and the prosecution's case was closed. The appellant requested to file submissions and the court directed that the court proceedings be issued to the Appellant. A further mention date of 7/12/2022 was issued and the file was placed under lock and key.

15. On 7/12/2022 and subsequently on 22/12/2022, the court proceedings were not yet typed and the matter was rescheduled for mention on 18/1/2023 where the appellant confirmed that he had the proceedings and was granted 30 days to file his submissions as he had requested. On 6/3/2023, the court confirmed that the appellant was supplied with duly proof-read proceedings and further stated that the ones that had been earlier issued were not proof read and had many typing errors which had since been rectified. The appellant then raised the issue that the Executive Officer denied him the opportunity to peruse the court file but the court stated that the same is under lock and key as per the court orders and therefore, it is procedural that the file is kept in the C.A's office and that any issues arising there from with the Executive Officer be raised administratively. The record confirms that the appellant understood the court's sentiments as he thereafter sought for 21 days to file submissions.

16. On 27/3/2023, the court noted that the appellant had filed an application seeking that the magistrate stays the matter and proceed to recuses herself from further hearing of the same. Meanwhile, the appellant confirmed that he had not filed submissions as earlier directed but sought to have the application heard first. On 30/3/2023, the court directed that the Application dated 24/3/2023 proceeded orally for hearing on 3/4/2023. On 3/4/2023, the Appellant sought and was granted time to file submissions to the Application and the matter was mentioned on 12/4/2023 where the Appellant served the Respondent with a Supplementary Affidavit and not submissions. The Appellant was granted time to file submissions and despite the matter being mentioned further on 10/5/2023, he still had not filed his submissions.

17. The court scheduled the matter for further mention for directions on 22/5/2023 where the court directed that it will not abdicate his duty at that stage after hearing and concluding the prosecution's case and in that regard, fixed the matter for Ruling on the Application dated 24/3/2023 and on whether the accused person had a case to answer.

18. The said Ruling was scheduled for 29/6/2023 in the presence of the Appellant which is what has been challenged on appeal. Despite defence hearing scheduled on 20/9/2023, the appellant sought and was granted stay of the trial matter pending the admission of this appeal.

19. Pursuant to this Court's orders issued on 26/1/2024, the trial court matter was stayed pending the hearing and determination of the present appeal.

20. At the core of this appeal, is the issue whether the trial court ought to have recused itself or not. Recusal of a court is a very weighty matter that need not be taken lightly. While it is a shield that ensures that a litigant gets his/her matter determined in an impartial court in accordance with tenets of Article 50 of the *Constitution*, it should be sparingly applied so as not to be abused to allow litigants to engage in forum shopping. That is why there are clear guidelines on how the question of recusal should be approached and considered.

21. The apex court, has guided on this issue in the case of *Jasbir Singh Rai & 3 others vs Tarlocham Singh Rai & 4 Others* (2013) eKLR. In this case, the Supreme Court stated as follows:

> "(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, 8, h ed. (2004) [p.1303]:
>
> "Removal of oneself as judge or policy maker in a particular matter, [especially] because of a 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."

22. The above authority clearly establishes that a party applying for the recusal of a judicial officer must do so on clear and substantiated grounds. In my view, the allegations made by the Appellant were vague, unsubstantiated, and appeared intended to undermine the independence of the court. Furthermore, the record of the proceedings before the trial court does not indicate any elements of bias. In fact, in my opinion, the learned trial magistrate was notably accommodating to the Appellant on several occasions, even when it was evident that the Appellant was making efforts to delay the progression of the matter.

One will argue that the numerous indulgences and accommodation accorded to the appellant by the trial court would have warranted the prosecution to raise concerns. The prosecution did none of this.

23. The court record contains no reference to the allegations made by the Appellant regarding the conduct of the trial Magistrate. There is simply no evidence to support any of the Appellant's unfounded allegations against the Honourable Magistrate that would justify recusal. The Appellant was present in court at all times when the court issued directions and did not raise any objections to those directions. Moreover, the record speaks for itself, the Appellant was fully aware that the court would deliver a ruling on both the Application dated 24th March 2023 and on whether he had a case to answer, as these directions were issued on 22nd May 2023.

24. In light of these circumstances, this Court infers that the Appellant's application for the recusal of the learned trial magistrate is motivated solely by a desire to delay, if not completely derail, the trial. Such conduct cannot be entertained by a court of law. There can be no better definition of abuse of court and process in this matter, than the filing of the recusal motion by the appellant. Hence, I find that the trial court was right in dismissing the recusal motion.

25. A party that fails to comply with court orders and/or directions cannot use his/her failure as a basis for alleging unfairness and/or bias. The appellant blatantly refused and/or ignored the numerous directions to file submissions on a case to answer. He was accommodated more than enough. Sensing the court's indulgence catching up with him, he brought a mala fide recusal motion. I find that nothing turns on the allegations that he was denied a chance to file submissions.

26. Lastly, on the impugned ruling that found that the appellant has a case to answer, I have read the impugned ruling by the Honourable learned trial magistrate delivered on 29/6/2023. The court found that the appellant had a case to answer and placed him on his defence. In *Republic v Martin Thigunku* [2021] eKLR, it was held thus:

> "6. Under Section 211 of the *Code*, a prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. (See *Ramanlal Trambaklal Bhatt –vs- R* [1957] E.A 332 at 334 and 335). However, it is trite that, where the court is not acquitting the accused person at the close of prosecutions' case, there is no need for a reasoned ruling for a case to answer. Reasons should only be given where the submissions of a no case to answer by the accused are upheld and the accused is to be acquitted. (See *Festo Wandera Mukando –vs Republic* [1980] KLR 103)."

27. The ruling herein is on all fours with the above decision and I have absolutely no reason to interfere with that ruling.

28. The upshot is that, the appeal herein is dismissed for want of merit.

29. Consequently, the stay orders issued on 26/1/2024 are hereby vacated. The matter is remitted back to the trial court for hearing of the Defence case.

Orders accordingly

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 4TH DAY OF OCTOBER 2024

For Appellant:

For Respondent:

Court Assistant: