Poghisyo v Republic (Criminal Martial Appeal E002 of 2023)
[2023] KEHC 22282 (KLR) (Crim) (19 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22282 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL MARTIAL APPEAL E002 OF 2023

DR KAVEDZA, J

SEPTEMBER 19, 2023

BETWEEN

LIUTENANT COLONEL THOMAS KIPTUM POGHISYO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being an application for revision of the ruling delivered by Hon. H.M Ng'ang'a Judge Advocate delivered on 17th March 2023 at Kahawa Garrison Court Martial Case No. 4 of 2021 Republic vs Lieutenant Colonel Thomas Kiptum Poghisyo)

RULING

1. The notice of motion for determination is dated 22nd March 2023. It is filed pursuant to Articles 159, 165 (6) of the *Constitution of Kenya*, sections 362 and 364 of the *Criminal Procedure Code*, sections 164 & 167 of the *Kenya Defence Forces Act*. The application is premised on the grounds on the face thereof and supported by an affidavit sworn by the applicant dated 21st March 2023 and a further affidavit 4th July 2023.

2. In the main, the applicant sought revision of the ruling delivered at Kahawa Garrison Court Martial Case no. 4 of 2021 on 17th March 2023. He applicant prayed the court orders the recusal of the Senior most member of the bench and order that the convening order be amended to reflect the new changes. The averment made in support of the application that he is an accused person before the court martial. On 20th February 2023, filed an application before the court martial seeking the recusal of the senior most member of the bench Brigadier W.S Wesonga on grounds that he has been appointed to the rank of Provost Marshal. Consequently, he became the head of Military police operations as per the police standing orders and cannot be a judge in his own case.

3. The applicant contended that the senior most member at the Military Police is charged with investigations and preferring charges. Consequently, one cannot be a judge in his own case. That if he continues participating in the matter, he cannot make a determination contrary to what his officers investigated. That his continued presence in the case is likely to interfere with his right to fair hearing as he will have served as an investigator and a judge in the same case. He maintained that the court martial erred in making a determination in its ruling of 17th March 2023. In addition, the impugned court martial ruling relied on a further affidavit without leave of court. He maintained that the court misapplied the law on the threshold for recusal. He urged the court to grant the orders sought.

4. In response, the respondent filed grounds of opposition dated 11th May 2023. The grounds raised are that the application is misconceived and unsubstantiated. The application is an abuse of the court process, the applicant having not demonstrated an error or impropriety on the ruling of the court martial to warrant grant of the orders sought.

5. In his written submissions, the applicant submitted that the Kenya Defence Forces Standing Orders 2015 state that the provost marshal is responsible to the Chief of Defence Forces (CDF) for the maintenance of discipline in the defence forces. The military police marshal is the principal advisor the CDF on all military police matters. It was submitted that the investigator cannot be a judge at the same time, which goes against the principles of the right to a fair hearing.

6. The applicant further submitted that section 167 of the *Kenya Defence Forces Act* provides that an accused may object to any member of the court, whether appointed originally or in place of another member. He therefore argued that he has a right to challenge the membership of a member at any stage. He maintained that the recusal application can be made at any stage of a trial. Further, that the prevailing principles for the recusal of judicial officers were applicable to the court martial since they were the decision makers. He cited the cases of *R vs Liverpool City Justices, Ex Parte Topping* [1983] 1 WLR 119 and *Kaplana H Rawal vs Judicial Service Commission & 2 other* [2016] eKLR in support of his position. He urged the court to grant the orders.

7. In rebuttal, the respondent submitted that on 28th May 2021, the applicant was given an opportunity to object to any member of the court martial including Brigadier Wesonga and he did not. It was argued that section 164 and section 167 of the *Kenya Defence Forces Act* do not allow for the objection of a member at any particular time. It was maintained that the Brigadier took oath to impartiality and the applicant has not present evidence to demonstrate he will not be impartial.

8. The respondent further submitted that the Provost Martial is not the head of military police but a staff officer at defence headquarters. He does not exercise command of the military police and neither is he in charge of investigations or operations. In addition, that the applicant has not established that there was real possibility that Brigadier Wesonga will be biased. The respondent cited the case of *Porter vs Magill* [2002] 1 ALL ER 465 as was discussed in the case of *P K Tunoi & Another vs Judicial Service Commissions & Another* [2016] eKLR in support of their position.

Analysis and determination.

9. I have considered the application, the response, the written submissions and the applicable law. The issue for determination is whether the applicant should be granted the revisionary orders sought.

10. The power of this court in its revisionary jurisdiction is founded under Section 362 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya which provides that:

> The High Court may call for and examine the record of any criminal proceedings before any subordinate court to satisfy itself as to the correctness, legality, or propriety of any finding,

sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

Article 165(6) of the *Constitution* provides that:

> The High Court has supervisory jurisdiction over the subordinate courts and over any person, body, or authority exercising a judicial or quasi-judicial function, but not over a superior court.

11. Consequently, this court has jurisdiction to entertain the application before me. In the instant application, the applicant sought a revision of the ruling delivered before the trial court on 17th March 2023. Before the trial court the applicant had filed an application seeking the recusal from the bench hearing his case of Brigadier W.S Wesonga on grounds that he has been appointed to the rank of Provost Marshal. He argued he was now the head of the Military Police responsible for investigations and charging military personnel. He can therefore not be a judge in a case he was responsible for investigating. The court martial dismissed his application in a ruling delivered on 17th March 2023.

12. In the premises, the key issue for consideration is the question whether the proceedings of the lower court and the ruling can be faulted in terms of correctness, legality or propriety. I have considered the impugned ruling. The reasons for denial of the orders sought were that the applicant failed to prove that the new role of the senior member of the bench involved conducting investigations. Secondly, the applicant had already been given an opportunity raise an objection against the participation of the member during the pre-trial stage.

13. The issue of recusal of a member of a bench in the hearing of a case before the court martial has been called into question. Section 160 of the *KDF Act* provides that a court martial comprises of a Judge Advocate and at least five members consisting of military officers appointed by the Defence Court Martial Administrator, Section 176 of the same Act states that the decisions of the court martial are made by a majority of the members of the court excluding the Judge Advocate.

14. The manner in which a court martial shall make decisions is provided by Section 176 of the *KDF Act* as hereunder:-

> " 176.
>
> (1) Subject to this section, every question to be determined on a trial by a court-martial shall be determined by a majority of the votes of the members of the court.
>
> (2) The Judge Advocate is not entitled to vote on the finding.
>
> (3) In the case of an equality of votes on the finding, the court shall acquit the accused.
>
> (4) In the case of an equality of votes on the sentence, the Judge Advocate has a casting vote.
>
> (5) A conviction, where the only punishment that the court can award is death shall not have effect unless it is reached with the concurrence of all members of the court and, where all the members do not concur in a conviction in such a case, the presiding officer shall declare a mistrial and the accused may be tried by another court."

The reproduced provision underpins the importance of the members of the court in making a determination whether an accused is found guilty or not. On the other hand, the Judge Advocate only advices the court martial on any question of law or procedure relating to the charge or the trial and ensure that the trial was fair. It is therefore the members who make the final determination through voting. They are therefore clothed with a judicial function. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. To this end they must resist all manner of pressure, regardless of where it emanates from. This is the constitutional duty common to all judicial officers.

In the case of *Philip K. Tunoi & Another vs Judicial Service Commission & Another* [2016] eKLR, in considering an application for recusal it was stated that:

> In Tumaini v. R. (supra) Mwakasendo J held, rightly in our view, that
>
> > "in considering the possibility of bias, it is not the mind of the judge which is considered but the impression given to reasonable people.....
> >
> > The House of Lords held in R v. Gough [1993] AC 646 that the test to be applied in all cases of apparent bias was the same, whether being applied by the Judge during the trial or by the Court of Appeal when considering the matter on appeal, namely whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand.
> >
> > The test in R v. Gough was subsequently adjusted by the House of Lords in Porter v Magill [2002] 1 All ER 465 when the House of Lords opined that the words "a real danger" in the test served no useful purpose and accordingly held that –
> >
> > > "The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

15. It would therefore mean that the Court in considering whether or not to recuse itself, the Judicial Officer would then be answering the question first whether on its own evaluation of itself, it would likely to be biased and second whether on the opinion of an informed mind, the Court would appear to be biased.

16. The *Black's Law Dictionary*, 10th (2014). Defines Bias as;

> " A mental inclination or tendency; prejudice; predilection. Actual Bias Genuine prejudice that a judge, juror, witness, or other person has against some person or relevant subject."

17. Finally, the *Bangalore Principles of Judicial Conduct* defines bias or prejudice as follows: -

> " Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one said or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind, an attitude or point of view, that sways or colours judgement and renders a judge unable to exercise his or her functions impartially in a particular case. However, this cannot be stated without taking into account the exact nature of the bias. If, for example, a judge is inclined

towards upholding fundamental human rights, unless the law clearly and validly requires a different course, that will not give rise to a reasonable perception of partiality forbidden by law."

18. Section 160 of the *Kenya Defence Forces Act* provides for the composition of the courts martial. It consists of a Judge Advocate, appointed under section 165, who is the presiding officer, at least five other members, appointed by the Defence Court-martial, an administrator if an officer is being tried; and not less than three other members in any other case. In addition to other principles and values provided for in the Constitution, the court-martial in the exercise of its powers and discharge of its functions, is guided by the principles provided for under Article 159(2) of the *Constitution*. It is therefore subject to the Laws of Kenya.

19. In this instant application, the applicant is seeking the recusal of a member of the court martial from hearing his case. The applicant argued that the Snr most member of the bench had been appointed as a provost marshal. As such, his position involved conducting investigations and preferring charges. It was argued that he became the head of Military police operations as per the police standing orders and cannot be a judge in his own case. That his continued presence in the case was likely to interfere with his right to fair hearing as he would have served as an investigator and a judge in the same case. The respondent denied the claims by the applicant. It was argued that the applicant was given an opportunity to object to the participation of the Snr most member but he opted not to.

20. The *KDF Act* defines a provost officer as a provost marshal or other officer appointed by the Commander, for a service of the armed forces, to be a provost officer for the purposes of this Act. Section 70 of the *Act* provides that a provost officer may arrest any officer or serviceman. From the record, the respondent did not dispute the claim that Brigadier Wesonga had been appointed as the Provost Marshal. What they are disputing is his role within the military. From a reading of the Act, he is clearly involved in maintaining law and order in the military and can be referred to as military police.

21. The next issue is whether his presence as a member of the bench may lead to an apprehension of bias. The two categories of bias are actual and apparent. The test for recusal differs between the two types of bias. In the case of actual bias, disqualification and recusal is automatic, without there being any "question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case" as stated by Lord Goff in the English case of *R. v. Gough* (1993) 2 All E.R. 724. In the case of apparent bias, the perception of impartiality is measured by the standard of a reasonable observer, and the English House of Lords in *Magill v. Porter* (2002) 2 AC 357, stated that the test for recusal is whether "a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased".

22. I note that public confidence in the judicial system does not result from the judiciary's perception of impartiality; it results from the public's perception of impartiality. Thus, a judge's belief that she is not biased is of little consequence to a recusal determination. The recusal standard is based on promoting public confidence in the judiciary and, by its terms, extends to an "appearance" of impropriety, even in circumstances where there is no actual impropriety.

23. The oath taken by members of the Kenya Defence Forces (KDF) at a court-martial is a solemn commitment to uphold the principles and responsibilities of their military service. This oath reflects the core values of loyalty, obedience, and service to the nation and its Constitution. The junior members take orders to obey orders and commands issued by superiors in accordance with the law, military regulations, and the Constitution of Kenya. As such, a Snr. Member plays a very crucial role in

the final outcome of cases at the Court Martial. It is my view therefore, that, there is a real apprehension of bias.

24. It is for this reason that I would disagree with the finding of the Judge Advocate that since the applicant was given an opportunity to raise an objection to any member of the bench, and to which he did not, he is estopped from raising any subsequent objection. I dare say that an application for recusal can be made at any particular time of the proceedings before judgement is delivered depending on the circumstances of the case.

25. Accordingly, I find that the circumstances of this case as they stand, give rise to a reasonable apprehension of bias, in the mind of the reasonable, fair minded and informed member of the public that the court martial as currently constituted will not apply its mind impartially during the hearing of the applicant's case. The application dated 22nd March 2023 succeeds and is allowed in the following terms:

    i. The Snr member Brigadier W.S Wesonga, 18765, is directed not to sit not only as a Snr member, but also as a member in the case against the applicant, Lieutenant Colonel Thomas Kiptum Poghisyo, at Kahawa Garrison Court Martial Case No. 4 of 2021.

    Orders accordingly.

CONCLUSIONS

RULING DATED AND DELIVERED VIRTUALLY THIS 19TH DAY OF SEPTEMBER 2023.

D. KAVEDZA

JUDGE

In the presence of:

Mr. Kiragu for the State.

Mr. Kamau for the applicant.

Applicant present on the platform.