



**Mose v Republic (Criminal Miscellaneous Application E016 of 2024)
[2024] KEHC 14056 (KLR) (Crim) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14056 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL MISCELLANEOUS APPLICATION E016 OF 2024
LN MUTENDE, J
NOVEMBER 13, 2024**

BETWEEN

BERNARD MBERA MOSE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Bernard Mbera Mose, the Applicant, was indicted for defilement contrary to Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act*. Particulars being that he intentionally and unlawfully caused his genital organ to penetrate the genital organ of the victim, aged four (4) years.
2. In the alternative he faces a charge of committing an Indecent Act with the same victim by touching her genital organs.
3. Trial in the matter commenced and so far five (5) witnesses have testified. Through an application filed herein on 16th December, 2023, the applicant seeks an order directed to the trial magistrate to recuse herself from the matter in the interest of justice.
4. In an affidavit in support of the application, the applicant depones that his right to fair trial has been violated by the State. That he sought to be supplied with a Post Rape Care form (PRC) and Birth Certificate before the complainant testified but the trial court rubbished the application.
5. That before the Doctor testified, he made an application to be supplied with medical documents but the application was dismissed. In the result, he was forced to proceed without being supplied with documentary evidence. This, it is argued, was in contravention of Article 50 (2) (j) of the *Constitution* on the right of disclosure of evidence, which is a right to fair trial that cannot be limited under Article 25 (c) of the *Constitution*



6. In response, the respondent through Mr. Mutuma, learned Prosecution Counsel urged that the record shows that the applicant informed court that he was ready to proceed with the matter which meant that he had all documents and statements for witnesses and he was granted an opportunity to cross-examine witnesses, the victim inclusive. That no reasons have been given that would call for recusal of the magistrate.
7. I have considered rival arguments. This court has been called upon to act according to Section 362 of the [Criminal Procedure Code](#) that provides as follows:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying 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.
8. The provision of the law that grants the High Court supervisory jurisdiction over the subordinate court is limited to amending incorrect, improper or illegal orders.
9. This is a matter where the applicant calls for recusal of the trial magistrate. Recusal is defined by the [Black's Law Dictionary](#), 8th Edition as:

“Removal of oneself as a Judge or policy maker in a particular matter (especially) because of a conflict of interest”
10. Recusal is a fundamental aspect where fairness and integrity is upheld in the legal system, because a judicial officer withdraws from hearing the case when it is established that there is potential bias, conflict of interest or lack of public confidence resulting into perceived impropriety.
11. In [Jasbir Singh Rai & 3 others V. Tarlochan Singh Rai & 4 others](#) (2013) eKLR the SC. held that:

“...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. ...”
12. Regulations 21 of the [Judicial Service Code of Conduct and Ethics Regulation of 2020](#) States as follows:
 1. A judge may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the judge— Recusal.
 - (a) Is a party to the proceedings;
 - (b) Was, or is a material witness in the matter in controversy;
 - (c) Has personal knowledge of disputed evidentiary facts concerning the proceedings;
 - (d) Has actual bias or prejudice concerning a party;
 - (e) Has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;
 - (f) Had previously acted as a counsel for a party in the same matter;



- (g) Is precluded from hearing the matter on account of any other sufficient
 - (h) Or a member of the judge's family has economic or other interest in the outcome of the matter in question.
- (2) Recusal by a judge shall be based on specific grounds to be recorded in writing as part of the proceedings.
- (3) A judge may not recuse himself or herself if—
 - (a) No other judge can deal with the case; or
 - (b) Because of urgent circumstances, failure to act could lead to a serious miscarriage of justice;
 - (c) The merits of the application for recusal have been considered by a plural bench of judges, and recusal held to be unnecessary.
- 4. In the case of a collegiate bench, the decision to dispense with the disqualification of any judge shall be made by the bench.
- 13. The contention of the applicant herein arises from proceedings of 23rd February, 2022 and 4th August, 2022 respectively. Looking at the record of the lower court, on 8th November, 2021 the applicant notified the court that he had not been supplied with statements and an order was made requiring the prosecution to furnish him with statements. On 22nd November, 2021 the case proceeded after the applicant confirmed he had statements and three (3) witnesses testified.
- 14. On 23rd February, 2022 the applicant was ready to proceed. He confirmed having been supplied with statements hence the case proceeded. The PRC and P3 were produced pursuant to the provisions of Section 33 of the *Evidence Act* as the witness was not the maker. This was done after the witness laid a basis for production of the documents despite not being the maker. He was his colleague hence conversant with his writing. An application was made by the Prosecution for the documents to be produced and the applicant stated thus:

“I have no objection.”
- 15. In the application for recusal, the applicant sought to be taken to another court where he would get justice. That he was not ready to proceed with the hearing and he prayed for recall of witnesses but the court declined.
- 16. In its ruling the court opined that the applicant was supplied with all documents and the application was merely a delaying tactic and an afterthought. It did find that the application for recusal was not merited.
- 17. A court of law is expected to make a decision based on legal principles but not following pressure exerted upon it. The applicant has not outrightly alleged that the trial magistrate has personal interest in the matter.
- 18. In the ruling delivered, the trial court gave reasons citing the age of the case, action taken by the applicant who confirmed having received relevant documents before the case proceeded. It is not insinuated that the court had prejudice against the appellant. No question of integrity has been raised. Therefore, arguments raised are insubstantial such that they do not meet the threshold for a court to recuse itself. The court simply upheld the principal that criminal trials must be determined



expeditiously. The victim having been a child of 4 years, hence vulnerable, justice required that the matter be expedited.

19. The upshot of the above is that the application is not merited. Accordingly, it fails and is dismissed.

20. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT
NAIROBI, THIS 13TH DAY OF NOVEMBER, 2024.**

L. N. MUTENDE

JUDGE

