



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION:**

**CRIMINAL REVISION NO. E 067 OF 2020**

**ABDULLAHI MOHAMED OMAR.....APPLICANT**

**VERSUS**

**REPUBLIC OF KENYA.....RESPONDENT**

**RULING**

1. The application herein is dated 21<sup>st</sup> October 2020, brought under Articles; 50 and 165 (6) & (7) of the Constitution of Kenya; Section 364 (1) (b) of the Criminal Procedure Code and all other enabling provisions of the law.

2. The Applicant is seeking for orders as here below reproduced;

*a) Spent;*

*b) That pending the hearing and determination of this application, the Honorable court be pleased to order for stay of; proceedings in Milimani Chief Magistrate's Criminal Case No. 1715 of 2018, Republic Vs. Abdullahi Mohamed Omar on; 28<sup>th</sup> January 2019, dismissing the Applicant's request for information dated 28<sup>th</sup> January 2019;*

*c) That the Honorable court be pleased to call up, revise and vacate the directions of; Honorabe Onkwani (PM) made in Milimani Chief Magistrate's Criminal Case No. 1715 of 2018, Republic Vs. Abdullahi Mohamed Omar on 28<sup>th</sup> January 2019, dismissing the Applicant's request for information dated 28<sup>th</sup> January 2019;*

*d) That the Honorable court be pleased to call up, revise and vacate the directions of; Honorabe Onkwani (PM) made in Milimani Chief Magistrate's Criminal Case No. 1715 of 2018; Republic Vs. Abdullahi Mohamed Omar and rendered on; 9<sup>th</sup> October 2020, dismissing the Applicant's application seeking to recall two prosecution witnesses (PW1 & PW2);*

*e) That the Honorable court be pleased to direct the Honourable Onkwani (PM) recuse herself from presiding over Milimani Chief Magistrate's Criminal Case No. 1715 of 2018; Republic Vs. Abdullahi Mohamed Omar pursuant to the Applicant's application dated 28<sup>th</sup> January 2019 and the said trial case be placed before an impartial court sitting in Milimani Law Courts;*

*f) That upon such calling up and examining the record of proceedings in Milimani Chief Magistrate's Criminal Case No. 1715 of 2018; Republic Vs. Abdullahi Mohamed Omar, the Honorable court be pleased to grant such order or further orders as may be appropriate;*

*g) That, costs of this application be in the cause.*

3. The application is supported by the grounds thereto and affidavit of the even date sworn by the Applicant. The background facts of the case are that, the Applicant was charged in two counts with the offences of; creating disturbance contrary to section 95 (1)(b) of the Penal Code and using insulting language in a manner likely to cause a breach of peace contrary to section 95 (1)(a) of the Penal Code.

4. He was arraigned in court on 13<sup>th</sup> September, 2018 and pleaded not guilty to both counts. On 10<sup>th</sup> October, 2018, he sought to be supplied with copies of the documents that the prosecution was relying on and CCTV footage clips. The prosecutor then told the court that, they had supplied the defence with all the documents. However, the court ordered that an inventory thereof be filed in court.

5. On 22<sup>nd</sup> November, 2018, the Investigating Officer told the court that, the prosecution did not have the CCTV footage sought as there were no CCTV cameras at the complainant's office and further all documents to be supplied had been supplied. However, the defence

counsel insisted that, there were CCTV cameras outside that office. Apparently, the matter was due for hearing on that day and whereas the prosecution was ready for the hearing the defence were granted an adjournment as the defence counsel was held up in a meeting. The matter was adjourned to 28<sup>th</sup> January 2019.

6. However, on that date, the defence once again sought for an adjournment as they required the prosecution to supply them with further documents. However, the request was declined by the court on the ground that, the prosecution had indicated that, the documents sought were not available. The court stated that, the defence was using the adjournment as a delaying tactic.

7. The case proceeded and two witnesses were fully heard. At the end of the hearing, the defence requested that, the prosecution witness; one Elizabeth be summoned to produce a Human Resource Committee Report that led to the dismissal of the accused. However, the prosecution objected and the court declined to allow the defence's request. The case was stood over to 13<sup>th</sup> March, 2019.

8. In the meantime, the Applicant filed applications dated 28<sup>th</sup> January 2019, under certificate of urgency, seeking for disclosure of information the prosecution was relying on and the recusal of the trial Magistrate. On 12<sup>th</sup> of June, 2019, the Applicant filed a formal application seeking for an order to recall PW1 and PW2, on the ground that, they had gotten the biometric log register that was not available earlier. The defence would serve the prosecution with the same.

9. However, the prosecution objected to the request and argued that, they had not been served with the subject documents. The court then ordered that, the defense supply the prosecution with the documents and an inventory be filed to enable the prosecutor to evaluate the documents and respond accordingly. The application for recall was heard and dismissed vide a ruling delivered on 9<sup>th</sup> October 2020. It is the order of the court declining to allow the defence request to be supplied with further documents and to recall PW1 and PW2, that forms the basis of this application.

10. The application herein was heard on 18<sup>th</sup> January, 2021, inter parties and basically the Applicant reiterated the averments in the affidavit in support of the application. However, the Applicant submitted that, the Honorable Magistrate has neither issued any directions nor delivered a ruling on this application for recusal, and therefore he is apprehensive that he will not get justice should the matter proceed to be heard and determined before the current Magistrate.

11. Further in dismissing the application for recall of witnesses, the Learned Honourable Magistrate made remarks that, the application was not made in good faith and no sufficient reasons had been advanced by the Applicant to warrant the recall of PW1 and PW2. In the same ruling, the Learned Magistrate made a prejudicial/adverse holding against the Applicant's defense to wit;

*“The defence in its wisdom or lack of it intends to assist the court in making judgment. It is wrong and in my opinion, I am disappointed with this style of prosecution issues by the defence.”*

12. The Applicant argues that, the remarks, the trial court not only exposed its biases and/or partiality thus conflicting itself from presiding over the case but also proceeded on a wrong principle of the law as was held in; *Joseph Murungi Vs Republic (2018) eKLR* that: -

*“An adverse comment regarding an accused person's choice of manner of defence is not acceptable at all and is an indication of bias in the mind of the court”*

13. That, after close of prosecution 's case, the Applicant's Advocate requested the trial court whether future proceedings could be on any other day other than a Friday or in the alternative the Applicant could be excused from attending court on 23<sup>rd</sup> October 2020 so that he could attend Friday prayers, being a devout Muslim but the trial court insisted that it can only sit on Fridays, having been transferred.

14. However, the Learned Counsel Ms Akunja for the Respondent, in response did not oppose the application and submitted orally that, with regard to recall PW1 and PW2, it was only proper for trial court to allow recall in the interest of justice. That, the prosecution did not address itself on availability of those witnesses although they were government officials who could be found. Further, as the trial court is on transfer but proceeded to hear the matter and due to comments made in the ruling, the apprehension is justified and the matter can be heard before another court. Therefore, the application should be allowed in its entirety.

15. I have considered the subject application and all the arguments advanced and I find that, prayers 1, and 2 of the application are spent and/or overtaken by events. As regards prayer 3, I find that, the trial court clearly indicated that, on 10<sup>th</sup> October, 2018, the Investigating Officer had informed the prosecutor that all documents in their possession had been supplied. That, there were no CCTV footage. If the prosecution state that they don't have any other documents, the defence cannot force them and/or direct them how to conduct their case or which documents to rely on. I find no reason to interfere with the order of the trial court on that. Indeed, if there are issues that may arise, the defence should submit on the same for the trial court to consider.

16. I shall now consider prayer four (4) of the application. In that regard I find that, Article 50 (2) (j) and (k) of the Constitution of Kenya, 2010 provides that;

*(2) Every accused person has the right to a fair trial, which includes the right: —*

*(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.*

17. In the case of; Thomas Alugha Ndegwa v Republic (2016) eKLR, the Court of Appeal observed that;

*“The right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the Public Prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. They must in other words, be able to, argue their cases on an equal footing.”*

18. Similarly, section 150 of the Criminal Procedure Code (cap 75) Laws of Kenya, states that:

*“A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:*

*Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.*

19. In the same vein, section 146(4) of the Evidence Act, (cap 80) Laws of Kenya states: -

*“The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively”.*

20. It is therefore clear from the above provisions of the law that, it is in the interest of justice and fair trial that where a witness has to be recalled, unless for good reasons the same cannot be tenable or achievable. I did not find any such reasons on record. Additionally, if the witnesses are easily available the application for recall should be allowed. The Respondent supports that position and I allow prayer 4 of the application. However, the witness will only be recalled for cross examination on the documents subsequently availed. There should be no cross examination on issues already dealt with.

21. Finally, the Applicant under prayer 5 seeks that, the trial Magistrate recuse herself from hearing the matter, for reasons already stated herein, and in that regard, the law on recusal and/or the test thereof is settled, and in the case of Metropolitan Properties (FG-C) Ltd Vs. Lannon & Others [1969] 1 QB 577, Lord Justice Edmund Davis stated that:

*“Disqualification was imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias.”*

22. In the same vein, Acker LJ, in R Vs Liverpool City Justices, Ex Parte Topping [1983] 1 WLR 119 stated that in considering the test applicable in an application for recusal, 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 is not possible. If the answer is in the affirmative, disqualification will be inevitable.

23. Further, in the case of; Jasbir Singh Rai & 3 Others Vs. Tarlochan Singh Rai & 4 Others (2013) eKLR, Supreme Court of Kenya Petition No. 4 of 2012, the court stated that: -

*“Recusal as a general principle, has been much practiced 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.*

*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.*

*It is an insightful perception in the common law tradition, which 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”.*

24. 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 colors 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.”*

25. In view of the afore legal authorities, and the fact that the application for recusal has not been and the Hon trial Magistrate is on transfer, coupled with the alleged remarks that the Learned Trial alleged made in the ruling delivered on 9<sup>th</sup> October 2020, which may be perceived to be “bias” or lack of partiality, and the fact that, Respondent seems to be supporting that argument in view of the fact that the magistrate is on transfer, I think it is only fair that the matter proceeds before any other magistrate in the station. I therefore allow the prayer five (5) of the application.

It is so ordered.

**Dated delivered and signed on this 10<sup>th</sup> day of February 2021, virtually.**

**GRACE NZIOKA**

**JUDGE**

In the presence of:

Mr Omoiti for the Applicant

Ms Akunja for the State

Yusuf Kandoro – Court Assistant