REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. E060 OF 2021

CATHERINE MWENDWA MWIRIGI.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

WILLIAM KIRIINYA & 4 OTHERS.....ACCUSED/RESPONDENTS

JUDGMENT

1. The appellant on 28.4.2021 approached this court through a petition of appeal dated 25/3/2021. The grounds of appeal although framed as 5 can be condensed into 3 as follows:

> **a) The trial court erred in law and fact in holding that the application dated 6/11/2020 lacked merit, and was meant to delay the matter.**
>
> **b) The trial court erred in law and fact in considering irrelevant issues to reach its decision, instead of considering the appellant's affidavits, annextures and submissions on record.**
>
> **c) The trial court erred in law and fact in failing to appreciate that it was handling three other matters involving the appellant and some of the accused persons.**

2. On the basis of such grounds the appellant discloses her ultimate goal in the appeal when she makes a prayer that the court directs the trial court to recuse itself and have the matter tried by another court. The question that this appeal begs answers for would thus include whether the appeal lies and if this court can direct a partly heard matter by one judicial officer to be heard and concluded by another. Those are the two issues I must resolve in this decision.

3. The respondents, faulted and opposed the appeal on the basis that it does not lie because to them, the appellant ought to have filed an application for revision instead of an appeal. This is a threshold issue going to jurisdiction and must be dealt with before I move one more step.

4. Section 347 of the Criminal Procedure Code is clear on when an appeal can be instituted and by who. It provides that *a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court;* I understand the law to limit the right to appeal to only those who have been tried and convicted. I read no permission for an accused person aggrieved by an order made in the course of his trial by the Magistrate's Court to appeal to the High court. A right of appeal, it remains trite must be permitted by a statute and in the absence of a provision permitting appeals from interlocutory orders at trial I am constrained to find that the court has no jurisdiction to entertain this appeal.

5. It is not that such an accused or complainant is rendered remediless. The decision made before trial can always be challenged in the appeal against conviction. There is also the remedy and recourse to revision under 362, *Criminal Procedure Code* which 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".**

6. Nonetheless, and even after finding that I have no jurisdiction to entertain the appeal, I propose to give a thought on the merits of the appeal had the court been seized of jurisdiction. In effect, the appellant seeks the substitution of the trial court's ruling dated 12/3/2021 with an order directing it to recuse itself from hearing Meru CMCC No.189 of 2019 and; the placement of the case before another magistrate for trial and final determination.

7. The court on 30/6/2021 heard weighty oral submissions from the parties herein. The appellant submitted that the trial court displayed open bias in handling her case, as a result of which she has completely lost confidence in that court and the prosecutor. On the other hand, the respondents submitted that it was inappropriate for the appellant to lodge an appeal before conviction, against an interlocutory decision. According to them, this matter should have proceeded by way of revision not an appeal. Section 348 of the Criminal Procedure Code sets the guiding principles on who should appeal. It is further submitted that the advocate, who was all along watching brief for the appellant, did not raise any issue of bias at the trial court. They contend that the appeal was never admitted and as such, it ought to be dismissed. They maintain that the appellant is forum shopping for a second chance to have the case start de novo, so that she can re-testify and correct her mistakes. The cases of **Benjamin Koome Kaithu v R (2020) eKLR and John Njenga Kamau v R (2014) eKLR** were cited to buttress those submissions.

8. It is, to this court, clear that the powers of revision under section 362 of the *Criminal Procedure Code are wider than those on appeal. Revision may be invoked* to enable the Court 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 subordinate court. To the contrary an appeal seeks to establish if the final finding and leading to a conviction and sentence can be legally be supported by the law based on the evidence on record. Accordingly, therefore, if out of indiscretion, say on account of anger, the trial court, magistracy, makes a decision in the course of trial, and before conviction, which is wanting in its correctness, legality or propriety or the proceedings are irregular, the High Court no doubt will step in and correct the same by revision and not an appeal. That is my understanding of the position adopted by the court in ***R v Alice Chepkorir & Anor (2018) eKLR*** *where* the court held that:

> **"It would also appear that the learned trial magistrate fell into anger to make a finding and conclusion not fully based on evidence before the court but on assumptions and personal knowledge of the circumstances when she said in her ruling:**
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> **"As at now there is no prosecutor in court. I am aware all the other three courts are not sitting as at now. There are two prosecutors at this station at least one should be before this court. This court cannot be held at ransom.'**

9. C

harges of bias or ill-will against an adjudicator are usually made by defeated disputants often motivated by disappointment at adverse verdicts. Where a party's conduct is deserving of judicial censure, strong language by the adjudicator in condemnation of that conduct cannot properly be stigmatized as bias or judicial hatred to justify an appellate court or indeed any supervisory tribunal in substituting its discretion for that of the trial court regardless of the facts, or provide such Court a warrant for exercising that discretion in favour of a party, who, on the facts, is entirely undeserving of that discretion. Here I find nothing wrong in the trial court finding, as it did, that the charge of bias was unfounded and merely intended intimidate the court and thus procrastinate the conclusion of the matter. I find such to have been wholly justifiable as the magistrate was by statute constrained to determine and conclude the matter, being a corruption case, within twenty four months. I have read the impugned decision and I have come to the conclusion that the court aptly took regard and gave weight to the pertinent consideration of all the relevant facts and law to be taken into account and even on the merits I would find no substance on the appeal. It was, for example, telling that the appellant had retained a lawyer to act for her as a victim of the crime and that lawyer never found anything untoward to suggest bias but another lawyer who could not be said to have had a feel of the case was recruited to do the application for recusal. The history and record of the file I have perused puts the appellant as one keen to have the accused persons punished at all costs by delay even prior to conviction. That is what I discern from the finding of the trial court. See para 19 to 25 of the ruling. Such cannot be just and must be curtailed and restrained by the court.

10. In any event, supervision is intended to correct designated errors and not to micromanage or just substitute the discretion of the supervisor for that of the supervisee. **Waweru, J** in ***R v Samuel Gathuo Kamau [2016] eKLR***, observed that:

> **"Needless to say, that supervisory jurisdiction is exercised as may be provided by law – by way of appeal, revision, etc. it does not include on any perceived power to make a decision on behalf of a subordinate court which that court ought to make. In the case of appeals, the supervisory power is exercised in respect to conviction, sentence, acquittal (section 347, 348 and 348A of the Criminal Procedure Code). As for revision, the supervisory jurisdiction is exercised in respect to findings, sentences, orders and regularity of any proceedings. See Article 165(7) of the Constitution and Section 362 and 364 of the Criminal Procedure Code." Emphasis added**

11. The foundation and the principle underlying the rational for recusal of judicial officers was restated by the Supreme Court in ***Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2013] eKLR*** as follows:

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

12. **The question that begs answer in every application for recusal is whether a fair minded and informed observer, having considered the facts of this case, would conclude that there was a real possibility that the trial court was biased.** I have carefully analyzed the lower court record and I am unable to see any real or reasonably apprehended bias, impartiality or danger on the part of the trial court. The appellant testified extensively on 14/8/2020, 31/8/2020 and 7/10/2020 and was released without her and her counsel raising any issue with the trial court's conduct of the proceedings. She cannot therefore be reasonably believed to say that the court was biased against her only because her sister had given evidence in Kiswahili and not kimeru. As the trial court did find, I equally find that the request for recusal was not made in good faith but reasons ignoble. In coming to this holding, I associate myself with the sentiments in the case of ***Attorney General v Anyang Nyongo & Others [2007] 1 Ea 12*** where the court held thus: -

"The court must guard against litigants who all too often blame their losses in court cases to bias on the part of the Judge. Success or failure of the government or any other litigant is neither ground for praise or for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them. There is a fundamental tendency for the decisions of the Courts with which there is disagreement to be attacked by impugning the integrity of the Judges, rather than by examining the reasons for the judgement. Decisions of our courts are not immune from criticism but political discontent or dissatisfaction with the outcome of the case is no justification for recklessly attacking the integrity of judicial officer...An application brought more out of a desire to delay the hearing of the reference than a desire to ensure that the applicant receives a fair hearing is tantamount to abuse of court process...It is indisputable that different minds are capable of perceiving different images from the same facts. This results from diverse facts. A "suspicious mind" in the literal sense will suspect even where no cause for suspicion exists and unfortunately this is a common phenomenon among unsuccessful litigants and that is why the mind envisaged in the test to determine perception of possible or likely bias on the part of the Judge is a reasonable, fair and informed mind.....<u>While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers merely because they believe that such persons will be less likely to decide the case in their favour</u>." Emphasis added

13. Applying the objective test as stated in the authoritative decisions I have read and being alive to the Bangalore principles where bias or prejudice is defined as a leaning, inclination, or predisposition towards one side or another, I find that the appellant's appeal is and would be misconceived, even had it been properly before the court, with the sole purpose of derailing the path of justice.

14. The upshot is that the appeal does not lie but even if it were to lie, it is devoid of merit and I order it dismissed.

Dated signed and delivered at Meru this 15th July, 2021

Patrick J.O Otieno

Judge

<u>In presence of</u>

Appellant in person

Mr. Maina for state

Mr. Mutuma and Munene for the respondents

Patrick J.O Otieno

Judge