



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISC. CRIMINAL APPLICATION NO. E009 OF 2021

HENRY NDWIGA KIURA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant herein filed the instant application essentially seeking orders that Hon. J. Ndeng'eri, the trial magistrate in Criminal case No. 760 of 2019 do recuse herself from hearing, taking evidence and/or recording any proceedings and/or delivering any judgment in this case; that this case be placed before the Hon. Judge for directions and re-allocation to another court of competent jurisdiction; and that there be a stay order directing the trial magistrate J. Ndeng'eri to cease from presiding over the matter or anything involving/related to the Criminal Case No. 760 of 2019 pending further orders of the court.

2. The application is premised on the grounds that the trial court is partial and biased as against the accused person and in favour of the complainant, that the trial court intentionally omitted recording crucial evidence during cross examination. Further that the trial court did not write the questions asked by the accused/applicant in cross examination and thus crucial evidence was lost and that the trial court was harsh to the applicant whenever he asked questions.

3. At the hearing of the application, the applicant made oral submissions and reiterated the contents of his application to the effect that the trial court was not recording proceedings and questions he had asked. He further submitted that on 28.01.2020 he applied for adjournment and the court declined the same. Further that he missed court on 24.04.2020 due to corona virus disease but the court issued a warrant of arrest despite the applicant not having been notified of the new date. He thus prayed that the trial magistrate do recuse herself and the matter be handled by a different magistrate.

4. Ms. Mati the Learned Prosecution Counsel opposed the application and submitted that the applicant had not given reasons why he was applying for recusal as required by the law. Further that the applicant had not shown the court the reasons why he thinks that the court is impartial. Further that article 50 of the constitution requires expeditious disposal of matters and as such the application ought to be dismissed.

5. I have considered the application and the oral submissions by the parties herein. As I have noted, the applicant basically seeks the recusal of the trial magistrate citing biasness. I have perused the record in the said criminal case No. 760 of 2019. I note that the applicant herein filed an application for recusal before the trial court on 2.03.2021 and wherein he cited partiality and biasness on the part of the trial court. The grounds in support of the said application appear to have been the same with the ones in support of the instant application. The said application was heard and vide the ruling delivered on 24.03.2021 it was dismissed. The said court in dismissing the application noted that there were no genuine reasons and grounds to accuse it (the court) of outright bias, as the court conducted itself professionally, dutifully and ethically.

6. As a matter of procedure, an application for recusal should be made before the court handling the matter as it's the competent court to handle such an application. The matter herein having been heard at the first instance by the trial court (court of competent jurisdiction), it therefore means that this court cannot re-hear the same application for the second time. Doing so would be an affront to the principle of finality to proceedings and the doctrine of res judicata. This court can only hear the matter on appeal. As such, the issue raised in the application cannot be heard by this court in exercise of its original jurisdiction. The same can only be entertained by this court as an appeal.

7. Despite the applicant having brought the instant application as a miscellaneous criminal revision, it is clear that the applicant does not seek revision of the proceedings of the trial court but only seeks orders which are exact and similar to the ones which were before the trial court. The same having been determined by the trial court, this court cannot re-hear the same application again. The doctrine of res judicata frowns against such an endeavour.

8. However, if it were a criminal revision and assuming there are good grounds, this court has jurisdiction under Section 362 to 365 of the

Criminal Procedure Code to 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.*** Under section 364, the exercise of the revisionary jurisdiction can either be upon application by a party or *suo moto* (where the proceedings comes to the knowledge of the court).

9. The application which was before the trial court was seeking recusal of the judicial officer in question. I have examined the record of the proceedings before the trial court and so as to satisfy myself as to the correctness, legality or propriety of the finding and the order of the trial court in relation to the said application for recusal. It is my considered view that the same cannot be said to be incorrect, illegal or improper. Despite the applicant having deposed as to the trial court having not recorded questions asked to the witness, there is nothing on record to prove that. The trial court in its ruling noted that the applicant herein would ask a question for several times and thus the court informed him that the answer had been given and recorded. It is my view that there was nothing to indicate that the ruling or the orders of the court dismissing the application for recusal were illegal, improper or incorrect. As such, the said orders cannot be revised under the revision jurisdiction of this court.

10. The issue of recusal of judicial officers from matters owing to their alleged bias in a particular case has been addressed in various case law. The Supreme Court in ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others [2013] eKLR*** gave the policy rationale and objective of the rule of recusal in these words:

“.....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.”

11. The Supreme Court held that the test to be applied when a party requests a judicial officer to recuse himself is

“the perception of a reasonable person, this being a “well-informed, thoughtful observer who understands all the facts”, and who has “examined the record and the law”; and thus, “unsubstantiated suspicion of personal bias or prejudice” will not suffice.

12. 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. (See ***Acker LJ, in R Vs Liverpool City Justices, Ex Parte Topping [1983] 1 WLR 119*** as was quoted with approval by the Supreme Court in ***Rai's case***).

13. Further in the ***Commentaries on the Bangalore Principles of Judicial Conduct***, which, at paragraph 81 it states:-

The generally accepted criterion for disqualification is the reasonable apprehension of bias. Different formulas have been applied to determine whether there is an apprehension of bias or prejudgment. These have ranged from “a high probability” of bias to “a real likelihood”, “a substantial possibility”, and “a reasonable suspicion” of bias. The apprehension of bias must be a reasonable one, held by reasonable, fair minded and informed persons, who apply themselves to the question and obtain the required information. The test is “what would such a person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would such person think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly.”

14. The question therefore is whether the judicial officer herein can be said to have been biased. In other words, whether the apprehension of bias by the applicant is a reasonable one, held by reasonable, fair minded and informed persons, who apply themselves to the question and obtain the required information.

15. The applicant's argument is that the trial court did not take down questions which he asked the witness. However, the trial court in its ruling stated that the applicant repeated the questions for a number of times and as such, the court stopped taking down the evidence. At the hearing he submitted that the trial court denied him an adjournment on 28.01.2020 after he applied for the same and further that warrants of arrest were issued despite him having missed court for genuine reasons.

16. I have perused the record of the trial court and I note that on 28.01.2020, the prosecution informed the court that he had three witnesses and that he was ready to proceed. The applicant did not raise any objection or even seek adjournment (as he alleges). After re-examination of PW1, he made an application for the trial court to visit the scene and which request the court noted and put on record that it shall assess the need at the conclusion of the trial. Further on 10.11.2020, the matter came up before the trial court and the record indicate that the applicant was not present. The court proceeded to issue summons to the accused through the Investigating Officer. On the next date, the applicant herein was not in court and the court issued warrants of arrest and which warrants were lifted on 17.12.2020 by the orders of Hon. T. K Kwambai SRM.

17. In my view, it cannot be said from the facts above that the trial court was biased. Issuance of warrants of arrest where an accused person fails to attend court is a legal procedure and a court cannot be said to be biased for that reason. Further under Section 197 of the Criminal Procedure Code, the evidence of each witness before the trial court is supposed to be taken down in writing or on a typewriter in the language of the court by the magistrate, or in the presence and hearing and under the personal direction and superintendence of the court, and should be signed by the magistrate.

18. Under Section 197(1)(b), such evidence shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative provided that the magistrate may take down or cause to be taken down any particular question and answer. There is nothing to show that the trial court failed to record the questions or the answers as alleged by the applicant herein.

19. In conclusion, the application before this court is res judicata as the same had been heard and determined by a court of competent jurisdiction.

20. The same is hereby dismissed.

21. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF JULY, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent