REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CONSTITUTIONAL PETITION NO. 1 OF 2017

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS

UNDER ARTICLES 3, 10(1), 21, 22(1) (2)(a)(b)(c) 25(1)(2) 26, 28,29 (a)

(c)(d)(f) 43, 48, 50, 51 and 238 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF

ARTICLE 16 OF THE CONVENTION AGAINST TORTURE

AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF

ARTICLES 2,4,6,7, 10, 19, 26 OF THE INTERNATIONAL

COVENANT ON CIVIL AND POLITICAL RIGHTS

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF

ARTICLE 2(2), 10(2) AND 14(2) OF THE CONVENTION ON

THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

AND

IN THE MATTER OF CONTRAVENTION OF SECTION

2, 3, 5, 8 AND 32 OF THE KENYA DEFENCE FORCES ACT

AND IN THE MATTER OF CONTRAVENTION OF

ARTICLE 1, 2, 3, 4, 20, 24 AND 25 OF THE PROTOCOL

TO THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S

RIGHTS ON THE RIGHTS OF WOMEN TO AFRICA.

BETWEEN

PHYLICE TAMNAI KIPTEYO & 17 OTHERS..PETITIONER

AND

CHIEF OF KENYA DEFENCE FORCES................1ST RESPONDENT/APPLICANT

THE ATTORNEY GENERAL....................................2ND RESPONDENT/APPLICANT

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS...INTERESTED PARTY

RULING

By an amended application dated 19th March 2021, the applicants seek orders;

1. That Hon S.N. Riechi the presiding Judge High Court of Kenya Bungoma recuses himself from hearing this matter henceforth.

2. The application herein be disposed of before the matter proceeds for hearing.

3. Costs of the application.

The grounds in support of the application can be summarized as follows;

1. The respondents are apprehensive that they will not get a fair hearing if the learned judge continues to preside over the matter.

2. The learned is biased and favours the petitioner's counsel.

3. That 7 petitioners testified on 13/11/2019 in court in the presence of all the other petitioners despite objection from respondent's counsel.

4. That the judge gave more audience to the petitioner's counsel.

5. That the judge attempted to force the respondent's counsel to return to court on 14/11/2019 despite the matter having been listed for hearing on 1 day.

6. That the judge only allowed the adjournment upon realizing the 6th and 7th petitioners' affidavits had gaps.

7. The judge awarded costs to the petitioners and counsel on 11/3/2021 without proof of such attendance in court despite the fact that no notice of virtual hearing had been given after a staff had tested Covid-19 positive.

The application is supported by the affidavit of Symon Yator, the respondent's counsel who has largely reiterated the grounds summarized above.

The petitioner filed grounds of opposition inter alia; the application is bad in law not substantiated in law, the matter had been fixed to be heard on 2 days since it was an old matter and that a transfer of the matter to another station would aggravate expenses since the court has 1 judge.

By directions of the court, the application was canvassed by way of written submissions which submissions and the authorities cited have been considered by the court.

The sole issue arising is whether the respondent/applicants have advanced sufficient to warrant the court to recuse itself.

The applicants' complaint is as I have summarized above. The applicant basically contends that the conduct of the judge on the dates of 13/11/2019 and 11/3/2021. That by such conduct, the judge in this matter ought to recuse himself.

The conduct of judicial proceedings in this country is governed by the Constitution, the Judicial Service Act, 2011 and the Judicial Service (Code of Conduct And Ethics) Regulations, 2020.

The test of whether a judicial officer ought to recuse himself has been subjected to a number of tests. In The Court of Appeal decision in ***Kaplana H. Rawal v Judicial Service Commission & 2 others [2016] eKLR*** it was held:-

> ***… For quite some time there was contestation in several Commonwealth jurisdictions regarding the proper test to be applied in such case: was it real likelihood of bias or reasonable apprehension of bias by a reasonable person.***

In ***Philip K. Tunoi & Another Vs. Judicial Service Commission & Another [2016]eKLR***, the Court of Appeal in considering an application for recusal held;

…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 facts of this case would not in our view, on the authority of Porter v. Magill (supra) lead a fair-minded and informed observer to conclude that there is real possibility that the Presiding Judge will be biased. It was not shown that circumstances exist that are likely to show that a real possibility exists that the Presiding Judge's integrity or impartiality might reasonably be questioned………

If in The People case, in light of the circumstances obtaining in it, there were no grounds for recusal of the members of the bench, the present application is a far cry from what the law requires to be established to arrive at a finding of existence of possibility of bias. It is our finding that the application lacks merit as there is no evidence of circumstances that would give rise to prejudice or jaundiced view on the part of the Presiding Judge…. In conclusion and applying the test in <u>Porter v. Magill</u> [2002] (supra), no fair-minded and informed observer, having considered the facts, would conclude that there is a possibility that the Presiding Judge or this Court will not be impartial or fair or will be biased. In the result, we dismiss the notice of motion dated 15th February, 2016 with costs to the respondents…"

Further, in ***Jasbir Singh Rai & 3 Others Vs. Tarlochan Singh Rai & 4 Others (2013) eKLR***, it was held;

… The recusal principle, therefore, with regard to the Supreme Court, must not be invoked but for good cause; and neither is it to be invoked without weighing the merits of such invocation against the constitutional burdens of the Court, and the public interest….

Even as this Court takes cognizance of the merits of the individual Judge's personal convictions, and of matters of ethics, in such a situation, it is inclined in favour of a choice which begins with the Judge's commitment to the protection of the Constitution, as the basis of the oath of office. The shifting scenarios of personal inclination should, in principle, be harmonized with the incomparable public interest of upholding the Constitution, and the immense public interest which it bears for the people, whose sovereignty is declared in Article 1(1). It follows that the recusal of a Judge of the Supreme Court is a matter, in the first place, for the consideration of the collegiate Bench, whose decision is to set the matter to rest…..

It follows that the Supreme Court concept, as it stands in the Constitution, and as a symbol of ultimate juristic authority, imports a varying set of rules of recusal, in relation to the practice in other superior Courts….

Applying the case law to the matter at hand, it is clear that the application is coming up when 7 witnesses have already testified. PW6 and PW7 were stood down on 13/11/2019, on application by counsel for the petitioners. The respondent's objection was recorded as follows;

Mr. Kituyi: I wish to stand down this petitioner.

Mr. Yator: we object to the application because we want to know whether it is her who made the document.

Court: the petitioner is stood down.

First, there is no evidence that the applicants protested to witnesses being in court when evidence was being taken. This ground must therefore fail for being unsubstantiated. There also is no evidence that the judge gave more audience to the petitioner's counsel than is necessary. Each party was given an equal opportunity to advance their case.

When the matter came up again for hearing before the court on 11/3/2021, the respondent's counsel informed the court that he had filed the instant application and only served a day earlier.

The petitioner's counsel objected to the matter being adjourned on the ground that the respondents had not fixed a date for the hearing of the application. That they had 12 petitioners who had travelled from Mt Elgon and therefore sought their costs. The court awarded them costs.

On the proceedings of 11/3/2021, the matter was coming up for hearing and the matter could not proceed because of the instant application. The applicants faulted petitioner's counsel for not informing the petitioners not to attend court.

The court notes the applicant's counsel had not fixed a date for the application and the date therefore remained a hearing date when the petitioners were expected to proceed with their testimony.

In my view, a court granting or refusing an adjournment cannot be a basis for an application for recusal to succeed. I find no merit in this application which is hereby dismissed with costs.

DATED AT BUNGOMA THIS 17TH DAY OF NOVEMBER, 2021

S. N. RIECHI

JUDGE