



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.509 OF 2019

MAGDALENE MIRIGO NDERITU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Magdalene Mirigo Nderitu is facing a charge before the Chief Magistrate's Court at Milimani in Nairobi of **obtaining by false pretences** contrary to **Section 313** of the **Penal Code**. The particulars of the offence which the prosecution was required to establish is that on 4th March 2014 at Equity Bank Harambee Avenue Branch in Nairobi County, with the intent to defraud, the Applicant obtained the sum of Kshs.2 million from Martha Karimi Muriithi by falsely pretending that she was in a position to sell two plots G562 and G563 at Embakasi

Ranching Company, a fact the Applicant knew to be false. The prosecution witnesses have already testified. The prosecution has closed its case. The trial court (Hon. P.O. Ooko – SPM) considered the submissions made on a case to answer and ruled that a *prima facie* case had been established to entitle the court place the Applicant to her defence. A date was fixed for hearing of the defence's case. Before the defence was heard, the Applicant filed an application seeking the recusal of the trial court from further hearing the case. The Applicant alleged bias on the part of the trial court. The trial court considered the application. In its considered ruling delivered on 13th September 2019, the trial court dismissed the application. It held that the same had no merit. The Applicant was aggrieved by the decision. She filed the present application before this court seeking recusal of the trial court.

In her application, the Applicant alleged that she would not get a fair trial since she was of the view that the trial court was partial. She alleged that during the trial, the trial court had created an impression in her mind that it was biased against her. In the affidavit in support of the application, the Applicant alleged instances where an unidentified judicial officer is alleged to have couched or assisted the prosecuting counsel when the complainant was adducing evidence before the court. She took issue in the manner in which the complainant gave her testimony. She alleged that the complainant was given considerable leeway by the trial court when she testified. She took this to mean that the trial court was partial to the complainant.

The Applicant further stated that she saw unidentified judicial staff in company of the complainant and a land broker who played a role in facilitating the sale of the parcel of land. Later she saw the prosecuting counsel go to the chambers of the trial magistrate on the date the ruling on case to answer was to be delivered. She took all these events to portend that her right to fair trial was being infringed. It was in that regard that she asked the court to recuse itself from hearing the case. The application was opposed by the prosecution. The prosecution's position was that the application was based on speculation and had no substance. The prosecution formed the view that the application was an attempt by the Applicant to subvert the course of justice by making outrageous and unsubstantiated allegations that had no merit.

After considering the application, the trial court, in dismissing the application, stated thus:

“Further, in paragraph 5, the accused has deponed having seen the state counsel on 1.4.2019 going into the trial magistrate's chamber before the delivery of the ruling on a case to answer which was scheduled for delivery on the same day. In her own wisdom and/or lack of it, that was an impression of bias on the part of court against her. Again I must reiterate that these averments were made out of total ignorance of the court processes which in my humble view could have been alleviated by proper legal advice. The accused ought to know that any criminal trial/proceedings cannot be conducted in the absence of a prosecutor, be it in chambers or in open court. At the same time she ought to have known that a good number of court do conduct hearings and those involving minors in chambers. This court is not an exception. This also applies to miscellaneous criminal applications when this court is not only sitting as the duty court but also when doing some bond approvals. In all these proceedings, a prosecutor must always be present and take lead of the prosecution case in chambers. By therefore proceeding with such matters in my chambers, I see no fault on the part of the prosecutor and/or any trial court which can be deemed as biased on the part of the accused. The mere fact that I conducted some hearings in chambers on 1.4.2018 which

coincided with the date of the delivery of a ruling on a case to answer in this matter cannot in itself create an impression of bias unless the same is particularly pleaded and proved.”

The Applicant was not satisfied with ruling. She filed the present application before this court. During the hearing of the application, this court heard oral rival submission made by Ms. Nganga for the Applicant and by Ms. Kibathi for the State. This court has carefully considered the said submission. It has also considered the pleadings filed by the parties herein in support of their respective opposing positions. The Applicant seeks the recusal of the trial court on the grounds that the trial court is biased against her. She is apprehensive that she may not get fair trial in her case.

The test to be applied by the court in determining whether an allegation of bias made against a judicial officer has merit was considered by the Court of Appeal in **Kalpana H. Rawal vs. Judicial Service Commission & 2 Others [2016] eKLR** where the court held thus:

“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 Magill v Porter (2002) 2 AC 357, the House of Lords subsequently modified the test to whether a fair minded and informed observer, having considered the facts, would conclude that there was real possibility that the Judge was biased. The East African Court of Justice adopted the same test in Attorney General of Kenya v Prof. Anyang Nyong'o & 10 Others EACJ Application No.5 of 2017 when it stated:

“We think that the objective test of “reasonable apprehension of bias” is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the Judge did not (will not) apply his mind to the case impartially. Needless to say,

a. litigant who seeks disqualification of a Judge comes to court because his own perception that there appearance of bias on the part of the Judge. The court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case.”
(underlining mine)

In the present application, this court has read the proceedings of the trial court. Prior to the trial court making the ruling of a case to answer, the Applicant did not have an issue with the court. Indeed, the Applicant’s perception that the court was biased arose from when the court made the ruling that she had a case to answer and therefore she ought to defend herself. The allegations that the Applicant made regarding seeing the prosecutor enter the trial magistrate’s chambers was explained by the trial magistrate in the passage that is cited above. Indeed, this court, being conversant with the court processes, knows as a fact that there is a constant interaction between a magistrate and a prosecutor in the course of performing their duties while conducting criminal trials. Some of the duties are performed in open court while others are performed in chambers. This court did not glean from the assertion made by the Applicant that the conduct of the trial magistrate was anything other than the normal course of conduct of court proceedings.

Furthermore, the allegation that an unnamed judicial staff guided the prosecutor in the conduct of the prosecution’s case, if true, cannot be visited on the trial magistrate. There is no evidence that the said unnamed judicial staff had contact with the trial magistrate in respect of the conduct of the particular trial. This court formed the view that the allegations made by the Applicant in seeking the recusal of the trial magistrate were not only speculative but without merit. No cogent evidence was placed before this court to support the allegation of bias on the part of the trial court as alleged by the Applicant. Applying the above cited test, it was clear to this court that a reasonable court applying the **“perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case”** that the allegations of bias made against the trial court has no basis in law and cannot be legally sustained.

In the premises therefore, this court holds that the Applicant failed to establish to the satisfaction of this court that the trial magistrate exhibited bias against her. Indeed, this court commends the trial court for conducting itself professionally and with judicial rectitude when faced with the application for recusal. The trial shall proceed before the same court to its conclusion. The application herein lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF APRIL 2020

L. KIMARU

JUDGE