REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

MISC.CRIMINAL APPL.NO.20 OF 2019

(Appeal Originating from Nyahururu CM's Court Cr.No.2248 of 2018 by: Hon. S. Mwangi – S.R.M.)

SAMWEL MUTAHI MWANGI.....1ST APPLICANT

BERNARD MWANGI NGURU.....2ND APPLICANT

- V E R S U S –

REPUBLIC.....RESPONDENT

R U L I N G

Samwel Mutahi Mwangi, **Benard Mwangi Nguru** and another, face a charge of Robbery with Violence Contrary to Section 295 as read with Section 296(2) of the Penal Code. Each of the two applicants have filed an undated application seeking orders that Hon. S. Mwangi, SRM, who has conduct of the case disqualify herself from hearing the matter because of violating their rights.

Samwel Mutahi, 1st applicant alleges in his affidavit that his rights were violated in court after he requested for witness statements, he was only allowed 15 minutes to prepare and to proceed with the hearing of his case; that the court refused to recall the witness after he made a request on 4/2/2019; that he requested the court to transfer the case to another court fearing he would not get justice but the court has declined. He therefore prays for a transfer of the case to another court for hearing and determination.

The 2nd appellant **Bernard Mwangi** made similar allegations.

In his submissions in court, the 1st applicant stated that on 4/2/2019 when he was given the witness statements, he was only allowed 15 minutes to prepare and proceed with the hearing; that he was forced to proceed yet he was not feeling well; that on 6/6/2019, he proceeded with the hearing and the first report to police that was produced in court was overwritten on but the court refused to consider it; that the Investigating Officer explained that the complainants had refused to come to court but the court insisted that they had to be arrested; that on 17/6/2019 when the Investigating Officer did not have the witnesses he was fined Kshs.10,000/= and that is when he decided to file this application.

On his part, the 2nd applicant reiterated what the 1st applicant said about being given 15 minutes to prepare their defence and proceed; that despite requesting to be allowed two days to prepare, the court declined that application; that on 6/6/2019 when he requested for the first report, he found that what he was given was not the correct report and the court refused to look at it saying it could not touch the report. He further stated that on 7/6/2019, the Investigating Officer (Senior Sgt.) brought a complainant's letter indicating that he did not want to proceed with the case and the court ordered his arrest and that on the 2nd time when the witnesses did not attend court, the Investigating Officer was put in prison; that they were not given all witnesses statements.

Ms. Rugut, learned counsel for the State in opposing the application, stated that the court supplied witness statements to the applicants on 24/1/2019 personally and that so far, no good reason has been put forward to warrant the court's recusal; that the applicants were unwilling to proceed with their case from the word go; that the1st applicant had intimated that he had been told in prison that the trial magistrate is not a good person and that is why he wanted the magistrate to recuse herself; that the applicants had at one time refused to take part in the proceedings; that the 1st applicant requested to recall PW2 and 5 and when recalled for cross-examination, the applicants refused to cross examine them. Counsel submitted that it is the applicants who have been sitting on their rights.

As respects the first report to police, counsel submitted that it was the duty of the applicants to cross examine the witness on the report and bring out the issues of forgery and that the court indicated that the maker of the report would be called for cross examination and there is no reason for the court to recuse itself.

I have considered the application, the rival arguments. If I understand the applicants well, they are alleging that their rights to a fair trial under Article 50(2)(c) and (j) have been violated. The said Section reads as follows:

"Article 50(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

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

(c) to have adequate time and facilities to prepare a defence;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."

Article 50(2)(j) requires that the prosecution discloses to the accused the evidence they intend to rely upon to enable the accused to prepare his case.

The applicants allege that they were not given witnesses statements in time and even after the statements were availed to them, they were not given adequate time to prepare for the hearing and hence have been prejudiced. They also allege that court refused to consider the evidence of the first report. They are apprehensive that they will not get a fair trial.

When can a court be disqualified from hearing a matter?

In ***Jasbir Singh Rai & 3 others v Tarlochan Singh L. Rai & 4 others (2013) eKLR***, the Supreme Court of Kenya Pet.4/2013 said as follows:

"(6) 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'."

[7] 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.

[8] It is an insightful perception in the common law tradition, that 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.

[9] Different jurisdictions make provisions, through statute or practice directions, for certain grounds for the recusal or disqualification of Judges hearing matters in Court. The most common examples, in this regard are: where the judicial officer is a party; or related to a party; or is a material witness; or has a financial interest in the outcome of the case; or had previously acted as counsel for a party."

As for the test to be applied, J. Ibrahim observed as follows:

"The issue of the circumstances under which a Judge may be required to recuse himself has been explained by the elaborate decisions of the courts made over the years which go as far back as the 19th century when the House of Lords in Dimes v Proprietors of Grand Junction Canal, set aside Lord Chancellor Cottenham's decision in the case on the ground that he had a pecuniary interest in the matter by virtue of the fact that he had a substantial shareholding in Grand Junction Canal. The court set aside that decision and held that Cottenham LC was disqualified."

This is supported by the commonly cited holding of Lord Hewart C.J. in ***Republic v Sissex Ex-Parte Mcarathy*** that ***"it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."***

In ***Republic v David Makali & 3 other Cr.Appl.MR.5/1994***, the Court of Appeal observed that in proceedings for disqualification of a Judge, it is necessary to consider whether there is a reasonable ground for assuring the possibility of a bias and whether it is likely to produce in the minds of the public at large, a reasonable doubt about the fairness of the administration of justice; that the test is objective and the facts relied upon must be alleged and proved.

In ***Patrick Ndegwa Wangu v Republic Cr.App.440/2003***, the court adopted the principles upon which the transfer of a case from one Judge (magistrate) to another in ***Shilenje v Republic (1980) KLR 132*** where the court said that there must be reasonable apprehension in the applicants or any right thinking person's mind that a fair and impartial trial might not be had before that magistrate or Judge.

In this case, therefore, I need to examine the allegations to see whether they meet the threshold set above; that is, do the allegations by the applicants raise reasonable apprehension in the minds of right thinking people or reasonable people that the applicants will not get a fair and impartial trial before the said magistrate.

The first allegation is that on 4/2/2019, when the appellants asked for witness statements, the court ordered that they be given the statements but allowed them only 15 minutes to peruse and proceed despite their protestation. The record shows that the matter came up for hearing on that day and each of the applicants said they were not ready to proceed because they were not given the witness statements.

The court then replied that the magistrate had personally supplied copies of the statements to them at the prison. The court then ordered that the applicants be supplied with statements again and the matter to proceed after pleas were done. It is not recorded when the court made this remark but at 12.45 p.m., the court resumed and each of the applicant had no question to the court. After procedure was explained to them the hearing kicked off with the calling of PW1.

Looking back at the record, the matter had been mentioned before the magistrate on 14/1/2019, not 24/1/2019 – I believe that is when the applicants were given statements. They had had about 10 days to prepare for the hearing. When the magistrate told the applicants that she had personally given them statements, they never disputed that fact. They were allowed some time and after that, the court went on to take the evidence of five witnesses on different dates. The applicants never once complained that they had not received witnesses' statements. The allegation that they were given 15 minutes to prepare for their case is not true. If it were true, they should have complained soon after the court made the order that they proceed but they cannot wait for five witnesses to testify before they spring up with the allegation.

The applicants also alleged that the court refused to consider the first report booked in the O.B., that it was a forgery because it had been overwritten on. The court allowed the applicant's application to have the first report produced in evidence. It was the duty of the applicants to cross examine the relevant witnesses on the said first report and point out the forgeries if any or discrepancies but the court could not rule on its veracity there and then. That determination would be made when the court considered all the evidence at the close of the prosecution case or at the close of the defence case when writing its ruling or judgment. It was premature for the applicants to expect the court to rule on the said report. Besides, the court had ordered that the author of the Occurrence Book (O.B.) be called which is the right course to take to enable the applicants further cross examination the maker.

What seemed to anger the applicants is the court's insistance that the witnesses appear in court to testify. The applicants face very serious offences. They are not misdemeanors where one may complain and easily withdraw or agree to a settlement. The witnesses who were allegedly robbed were compellable witnesses and the court has to ensure that they attend court. On the other hand, it is the duty of the Investigating Officer to ensure that witnesses attend court and it is not the business of the applicants to decide for the court how to enforce that. If the investigating officer was fined, why are the applicants making it an issue as if they were the ones fined. Fining of the investigating officer does not affect their rights to fair hearing.

Although the applicants seem to be alleging that the court had refused to recall some witnesses, that is, PW2 & 5, it is clear from the record of 6/6/2019 that the court agreed to have the two witnesses recalled on a date after 7/6/2019 but not on 7/6/2019. It seems the applicants did not take that well and on 7/6/2019 the 1st applicant stated that he had information from prison that the magistrate was not a good person and that is why he wanted her to recuse herself from hearing the matter.

The 2nd applicant also asked the court to recuse itself, but the court declined their application. After that, the applicants declined to cross examine PW 7 & 8 and even when their request to recall PW2 & 5 was granted, they refused to cross examine the said witness. It just means that the applicants had set and predetermined minds that they did not want to be heard by the trial magistrate.

The applicants also complained that some statements did not have names of witnesses and hence they did not amount to statements. However, it was explained by the State counsel that on some statements, names of witnesses are withheld for their own security. In my view, obscurity of the identity of a witness is necessary and a justifiable measure of protection of witnesses in a free and democratic society like Kenya and that measure does not violate the right to fair hearing under Article 50 of the Constitution

Having examined the court records, I find totally no evidence of breach of the applicants' rights to fair trial. I think the court was quite patient and fair to the applicants. Despite the fact that they had been issued with witness statements earlier, the court allowed them some time to prepare on the date they come to court; the court allowed them to call for the O.B., on first report to police and allowed them to recall witnesses. It seems that the applicants had made up their minds not to the heard by the trial court and were trying all they could to have the court recuse itself. It is not for the applicants to choose which court should hear their matter. They are not allowed to shop for a court to hear them as they wish. They have not demonstrated that the court was biased or likely to be biased nor can a right thinking person believe that the court was biased.

The case has been heard by the magistrate substantially and so far, a total of seven witnesses have been called and should it proceed from where the court had reached. Article 50(2)(f) gives the court the discretion to proceed with a case where an accused declines to take part in the proceedings or makes it impossible for the trial to proceed.

The upshot is that the application lacks any merit. It is hereby dismissed. The applicants will proceed with the hearing of their case before the trial magistrate to its logical conclusion and there should be no more waste of time. If the applicants want to recall witnesses, they should do so once and for all. The 3rd accused is a lady with two children in remand and was not party to the application but has been held hostage by the applicant's applications. The case be given priority.

Mention before the trial court on 25/5/2020.

Dated, Signed and Delivered at Nyahururu This 19th Day Of May, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut for State Counsel

Applicants – present

Eric – Court Assistant