



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CRIMINAL CASE NO. 9 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**WESLEY LANGAT KIPRONO.....ACCUSED**

**RULING**

**Background.**

1. On 22<sup>nd</sup> October 2019, counsel for the accused applied for transfer of the case to another High Court on the basis that the facts in the instant case are similar to those that the accused as a witness had testified about in this court. Counsel also submitted that his application was necessitated by the need to have the fair trial rights of his client to be respected. He finally submitted that he was not forum shopping.
2. Ms. Nyaroita opposed the application on the basis that a transfer will convenient to the prosecution witnesses. And that the accused has not demonstrated that this court will not be impartial. She also submitted that the fact that the accused testified as a witness in the previous trial will not prejudice his trial.
3. A result of the foregoing I ordered counsel for the accused to file a formal application, which is as shown herein below.

**The case for the accused.**

4. Pursuant to the provisions of article 50 of the 2010 Constitution of Kenya, section 81 of the Criminal Procedure Code (Cap 75) Laws of Kenya, the accused has in his notice of motion applied for the following major orders.

1. An order that this court recuses itself from trying this case.
2. An order transferring this case to another High Court for hearing and determination namely to the High Court in Naivasha.

5. The application is supported by the following major grounds. This court (Hon. Justice J.M. Bwonwong'a) heard and delivered his judgement in *Criminal Case No. 23 of 2017, in Republic v Samuel Njenga Muchai*, in the High Court at Narok, which case has identical facts to this case, save that the accused herein was one of the prosecution witnesses in that case. In that case the court after acquitting the accused therein on 12<sup>th</sup> February 2019 the court went further and ordered the D.C.I.O Narok North to arrest and charge Wesley Langat Kiprono with the murder of the deceased (James Karinkai Koikai). The police moved with speed, arrested and charged the accused herein before this same court with murder. This court has taken a tangent of a perception of a court that has already made up its mind regarding the guilt of the accused in this matter.

6. In the circumstances, it is only fair that this application be allowed. By virtue of this court's judgement of 12<sup>th</sup> February 2019, the accused is reasonably apprehensive that he may not get a fair and impair trial. If this court continues to preside over the trial of the accused, it is highly unlikely that justice will be seen to be done, which will be to the prejudice of the accused. There is a reasonable probability that this court will be biased.

7. The accused who is the applicant herein has deponed to a 20 paragraphs affidavit. The major averments are as follows. The accused has replicated the same matters that are set out on the face of the notice of motion. The only exception is that the accused has annexed to his affidavit the judgement of the court in which the order of arrest was issued. It is not necessary to reproduce those averments here.

**The case for the respondent**

8. The prosecution has opposed the application. The prosecution has filed written submissions in opposition to the application. The respondent has cited many authorities in support of its case. The major cases are as follows. In **Attorney General v Anyang' Nyong'o & 10 others [2007] 1 EA 12** in which the court ruled that there was a presumption in law against partiality of judicial officers assigned to determine cases. The court in that case pronounced itself as follows. "before taking office, every judge of this court, like judges of other courts universally, takes the judicial oath undertaking to serve the community and to do justice in accordance with the Treaty as by law established and in accordance with laws and customs of the community..... without fear or favour, affection or ill will." Based on this authority counsel for the prosecution submitted that the person who alleges that a judge is biased or reasonably apprehended to be biased must establish with specificity the grounds upon which they hold their belief.

9. Furthermore, Ms. Nyarota for the prosecution also cited *Kaplana H. Rawal v Judicial Service Commission & 2 Others [2016] ECLR*, in which the Court of Appeal in dismissing an application for recusal of one of its judges stated that: "It cannot be gainsaid that the applicant bears the duty of establishing the facts upon which the inference is to be drawn that a fair minded and informed observer will conclude that the judge is biased. It is not enough to just make a bare allegation."

10. Finally, counsel cited *John Brown Shilenje v R [1980] eCLR* in which the High Court (Trevelyan J), explained that "*The High Court will always require some very strong grounds for transferring a case from one judicial officer to another, if it is stated that a fair and impartial inquiry or trial cannot be held, especially when the statement implies a personal censure on such officer.*"

11. Additionally Counsel has submitted that an order of transfer from the High Court at Narok to another High Court will not be to the general convenience of the parties or witnesses as required by section 81 (1) (e) of the Criminal Procedure Code, as all the prosecution witnesses except the Government analyst come from Olokurto division of Narok county.

12. Counsel has therefore urged the court to dismiss the application.

### **Issues for determination**

13. I have considered the affidavit evidence of the accused and the submissions of counsel for the respondent and the authorities cited. I have done so in the light of the applicable law. I find the following to be the issues for determination.

1. Whether or not the accused has made out a case for the grant of an order for recusal.
2. Whether or not this case should be transferred to another High Court.

### **Issue 1**

14. The order dated 12/2/19 to the police to charge the accused was coached in the following terms:

15. "The DCIO Narok North is hereby ordered to arrest and charge No 2001009455 Cpl Wesley Langat with the murder of the deceased, James Karinkai Koikai. The Deputy Registrar is hereby directed to serve a copy of this judgement and order upon the DCIO."

16. Following the above order, the accused was arrested and charged with murder. The case was fixed for plea and the accused pleaded not guilty. It was then fixed for pre-trial conference on 23/7/2019. On 23/7/2019 the case was fixed for hearing on 21<sup>st</sup> and 22<sup>nd</sup> October 2019 and on 4<sup>th</sup> and 5<sup>th</sup> November 2019 with the bail of the accused being extended.

17. The above order viewed objectively is capable of two perceptions. It may be perceived as the belief of the court in the guilt of the accused. It may also be perceived as one that will depend on evidence to establish the guilt or innocence of the accused.

18. Furthermore, the fact that the accused made the application for transfer after the plea was taken and after the holding of a pre-trial conference and dates for trial fixed may very well be a forum shopping exercise.

19. The upshot of the foregoing is that in the interests of a fair and transparent trial, I hereby recuse myself from presiding over the trial of the accused.

### **Issue 2**

20. I find that a transfer is warranted, but to the High Court in Naivasha, which is equally convenient to the parties and witnesses in terms of section 81 of the Criminal Procedure Code.

21. In the premises, the application succeeds in terms of prayer numbers 1 and 2 of the notice of motion dated 15<sup>th</sup> November 2019.

**Ruling delivered in open court this 15<sup>th</sup> day of July, 2020 through video link in the presence of Ms. Torosi for the Republic and Mr. Okiro for the accused.**

**J.M. BWONWONG'A**

**JUDGE**

15/07/2020