



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL CASE NO. 29 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

ERIC MUNGERA ISABWA *alias* CHAIRMAN.....1ST ACCUSED

RAPHAEL KIMANI GACHII *alias* KIM BUTCHER....2ND ACCUSED

MUSTAFA KIMANI ANYONI *alias* MUSTO.....3RD ACCUSED

STEPHEN ASTIVA LIPOPO *alias* CHOKORE.....4TH ACCUSED

JANE WANJIRU KAMAU *alias* SHIRO.....5TH ACCUSED

MARGARET NJERI WACHIURI.....6TH ACCUSED

SIMON WAMBUGU GICHAMBA.....7TH ACCUSED

RULING

Introduction

1. For record purposes this ruling does not refer to 5th and 6th accused persons. The accused persons in this cause faces four counts of murder contrary to Section 203 as read with Section 204 of the Penal Code. They first appeared in court on 13/03/2015 before Lesiit J who deferred their plea taking to 19th of March, 2015 when they all pleaded not guilty to the four counts and a plea of not guilty was duly entered in their favour.

2. On 27/4/2015 all the accused persons appeared before the Judge (Lessit, J) save for the 5th and 6th accused persons and an order was made that the Registry to fix the matter for hearing on bail application when the same is duly filed. On 29/6/2015 only the 4th accused had filed the application for bail which was fixed for hearing on 15/7/2015. On the said date the application did not proceed since the State had just filed and served their Replying Affidavit. On 22/7/2015 the 4th accused was given time to file further affidavit and matter fixed for hearing on 17/9/2015.

3. On the said date the matter was placed before R. Korir, J and once again the 4th accused sought time to file a Supplementary Affidavit, which was allowed with corresponding leave to the prosecution and the matter fixed for hearing on 6/10/2015, at which point in time the 2nd accused had also filed his application. The matter was therefore allocated to Korir, J and fixed for hearing on 14/10/2015. On the said date the 2nd, 4th and 5th accused had filed applications for bail but had not served the State.

4. The applications were fixed for 29/10/2015 when the 5th accused was not produced in court and an order for production was issued for all the seven accused persons and the application fixed for 16/11/2015, when the application was argued and ruling fixed for 28/11/2015 with hearing dates set for 23rd November to 17th December, 2015.

5. On 23rd November, 2015 for some strange reason, the matter was cause listed before me but could not proceed since the Advocate for the

6th accused was missing in action. On this date the State had present in court five witnesses. The matter was taken out of the cause list and the Deputy Registrar directed to appoint a new Advocate for the 6th accused. On 2/12/2015 the matter appeared before me once again, Mr. Mathenge having been appointed to represent the 6th accused, Mr. Wahome having been discharged. The 6th accused indicated that she intended to file an application for bail and fixed for hearing on 1/2/3/3/2016.

6. In the meantime on 29/2/2016 Justice Korir delivered herein ruling in which she declined to grant bail to the three applicants namely 2nd, 4th and 5th Accused. On 1/3/2015 the matter was fixed for hearing before me but could not proceed since the prosecution had intended to use a projector which was not available in court. On 2/3/2016 the court was ready to take the evidence of PW1 INSPECTOR JACKSON CHEBOI but all the accused persons objected to his testimony on the basis that they had not been served with CCTV record which he had intended to produce. The court agreed with the defence and took out the matter to enable the Advocates review the footage with their clients. Being a fresh matter, I referred the same back to the Presiding Judge for re-allocation and on 7/3/2016, being the Duty Judge, I fixed the matter for hearing on 11th to 14th day of July, 2016 as per the court diary.

7. On the 11th July, 2016 the matter was placed before the Deputy Registrar who fixed it for mention before the Presiding Judge on 21/7/2016 who then fixed the hearing on 28th to 30th November, 1st to 8th December, 2016 and officially allocated the file to this court. On 28th November, 2016 the trial began before me up to 10/12/16 and 7/12/16 when the matter could not be reached due to the nature of the cause list for those days. On 8/2/2017 the 1st accused raised a complaint against the prison authorities on having been locked in the cells between 30/12/2016 to 23rd January, 2017 and the court ordered an investigation on the same with an order that the Report be presented to court on 4/3/2017 when the report was presented to the court and the 1st accused Advocate. On 13/4/2017 the Advocates for 2nd, 3rd and 6th accused did not attend court and the matter taken out. The 1st accused then sought for bond and was directed to make a formal application. On 8/5/2017 I directed that all the accused persons who had not applied for bail to do so within the next seven (7) days and directed the probation department to prepare and submit to court pre-bail reports in respect of them.

8. On 23rd May, 2017 the 3rd, 6th and 7th accused had not filed applications for bail while the 1st accused filed application for review. The court fixed the main hearing for 20/6/2017 when the evidence of PW2 was taken at the close of which the defense requested for pictures and video clips at the next hearing. On 24/7/2017 the court visited the scene of the murder and proceeded with the evidence of PW2. On 28/9/2017 the Court took the evidence of PW3. On 12/10/2017 the evidence of PW4 was taken.

9. On 12/10/2017, the court delivered a ruling in respect of the application for bail by 1st, 3rd, 6th, and 7th accused persons in which the court found compelling reasons to deny them the right to bail and the case proceeded for further hearing on 29/1/2018 – PW5, 10/4/2018 – PW6 11/12/4/2018 - PW7, 7/6/2018 - PW8, 9/10/2018 -PW9. In the meantime on 30/1/2019, the accused persons filed an application for review which was fixed for 6/2/2019 for hearing by the duty Judge. On 26/2/2019 – PW10 and PW11. On 27/2/2019 – PW12, 28/2/2019 - PW13 & PW14, on 7/5/2019 - PW15 and on 9/5/2019 the application for review was heard and ruling thereon set for 30/5/2019. On 29/5/2019 the evidence of PW16 was taken.

10. On 30/5/2019, the prosecution did not have witnesses in court and they applied for adjournment which was opposed by the defence and in a well-reasoned ruling stated as follows:-

“Based on the fact that the DCI Central for the first time in the history of this court has put it down in writing the reasons for the non-availability of the intended two witnesses, though not accounting for the remaining witnesses, I will grant the prosecution adjournment to enable them call the remaining witnesses at the next hearing date scheduled for 15/16/17/10/2019.”

11. I thereafter proceeded to deliver the ruling on the application for review in which I dismissed and ordered that the matter be cause-listed for hearing for a period of continuous seven (7) days so as to remedy the likelihood of violation of the accused persons constitutional right of speedy trial. This is when hell broke loose leading to the application the subject of this ruling. The accused persons then decided to shout at the court and indicate that they shall never be attending any further hearing before the same and it was therefore not necessary to grant them a hearing date. At that stage Mr. Wakaba for the 5th and Mr. Mathenge for the 6th accused persons stated that their clients did not associate themselves with the action of the other accused persons who walked out of court and were willing to take the dates.

12. I then made the following order; -

“For the benefit of the 5th and 6th accused persons further hearing on 22/23/24/25/10/2019 confirmed subject to the action the remaining accused persons would wish to take.”

13. I have taken the liberty of setting the historical background of this matter as a result of the allegations made by the applicants in their affidavits in support of their application for recusal so that the records of the court can speak for itself. This is a matter where each accused person is represented by an Advocate all who must cross examine the prosecution witness. The court as can be seen above has given the accused persons all the available judicial time and cannot be said to have been bias against the accuse persons in favour of the prosecution.

14. On 6/6/2019, the applicants wrote to the Presiding Judge for a requests that this court recuse itself from this matter which was placed before the Judge who advised on 5/7/2019 that such application can only be heard by the trial court. On 20th September, 2019, the accused persons together with other three sets of accused persons caused a letter of complaint to be written to the JSC in which they sought the following orders: -

“i. Based on the grounds set out above, the accused persons in Criminal Case No. 41/2014, 29/2015 (the subject matter) and 67/2015 whose matters are tried by Hon. Justice Wakiaga feel unsafe in being tried by the same Judge hence we petition

the Judicial Service Commission to institute a tribunal to investigate Hon. Justice Wakiaga under Article 168(1) (a), (d) and (e) of the Constitution the basis of incompetence and gross misconduct (misbehavior)

ii. Hon. Justice Wakiaga be suspended from Criminal bench until investigation is over and if cleared he can be returned to the bench.

iii. Petitioners pray that their criminal case files be transferred to any other court within the local limit of jurisdiction. They fear that their fair trial rights as enshrined in the constitution will be prejudiced if he continues discharging his judicial duties.

iv. Attached find application and letters filed against the embattled Judge at High Court Nairobi. No action has been taken so far against him. (Hon. Justice Wakiaga.)”

15. On 15/10/2019, the Applicants did not appear before court. Mr. Ongaro Advocate informed the court that he was appearing in the Willy Kimani matter and therefore the matter be taken out while Mr. Orlando informed the court that no production order had been issued against the accused persons. The matter was taken out and fixed for hearing on 22nd October, 2019 when the 1st and 3rd accused persons indicated that they were not ready to proceed before this court and sought that the file be placed before the presiding Judge for directions. The cause was therefore taken out and fixed for mention on 24/10/2019 for further directions when the court directed that each accused person who wished that the court recuse itself file and serve their respective applications which were duly filed and the subject matter of this ruling.

APPLICATIONS

16. The 1st accused person though represented by an Advocate Mr. Wachira on 13/11/2019 filed an application under certificate of urgency – in person - in which he sought orders that the file be transferred to another Judge within the local limits of jurisdiction as he had lost faith with the trial court. That this court to release the file to the Principal (sic) Judge Criminal Division, to be assigned to any other Judge who is **competent, unbiased, independent and strong enough to protect the right of both the accused persons and the victims, as the current trial Judge had proved to be contrary.** He sought stay orders until this court recuse himself from hearing the case. (Emphasis added)

17. The application was based upon general grounds stated on the face thereof, but which for the purpose of this ruling can be summarized as follows:-

a. The court has acted with partiality and biasness while conducting this trial and that he decisions the court makes are not in the interest of justice including not obeying his own orders thereby making it a ‘prosecuting Judge’ who is willing to grant adjournment to the prosecution so that all prosecution witnesses are produced.

b. That the court only grants bail to accused persons who hails from his community and applies selective justice while discharging his judicial duties as since the 2015 when he reported to the station, he had only acquitted four (4) persons out of thirty two (32) and had never acquitted accused persons at “Ruling stage” like other Judges in the Division.

c. That the court fears handling cases which attract public attentions and is not strong enough to withstand the influence of the media and public.

d. That the court never trusts himself in the decisions he makes and rather makes decisions that pleases the victims rather than delivering justice as if he is serving the interest of ODPP.

18. The application was supported by his affidavit wherein he deposed, that the trial court is the cause of delays in this cause which had not been concluded since 2013 as the Judge sits on Tuesdays, Wednesdays and Thursdays. The court has the habit of openly classifying some cases as high profile and makes reckless statements in court which had created apprehensive fear that his rights to fair trial had been threatened. It was deposed that of the thirty-two (32) cases concluded by the court, only four were acquittal while twenty-eight (28) had been harshly sentenced.

19. It was stated that the court had been delaying this matter having heard only seventeen (17) prosecution witnesses with a similar number to go which will take another four years for the matter to be concluded.

20. The 2nd accused on 21/11/2019 filed an affidavit in support of the application herein in which he deposed that on 30th May, 2019 having been dissatisfied with the ruling of the court on the applications for review, he instructed the Advocate for the 3rd accused to immediately apply for the Honourable Court’s recusal which he declined and when he attempted to address the court, he was denied audience resulting into a walk out from the court. He confirmed having written a letter to the Presiding Judge and that he learned from other remandees that on 30th May, 2019, after the walk-out the court made reference to their case before the Chief Magistrate’s court and wondered how the court knew what transpired before the lower court.

21. He further deposed that he learnt from his fellow remandees that the court had made a comment on the letter which they wrote to JSC on 15/10/2019 that the court was only fit to handle civil matters and wondered how the court got that information. He stated further that in June, 2017 the court directed that no further documentary evidence should be supplied by the prosecution only to change on 29/5/2019 and directed the prosecution to supply call data records, thereby giving the prosecution preferential treatment. It was deposed further that the court had informed them that it was ready to hear the application for review after hearing civilian witnesses only to deny them bail on 30/5/2019.

22. It was deposed that the court had granted an accused person in HCCRC No. 35/2013, cash bail having been placed on his defence and

advised the 5th and 6th accused persons to apply for review of bail in his absence there by showing that the court was biased towards him.

23. The third accused also filed an affidavit on 29/10/2019 in support of the application in which he deposed that having been dissatisfied with the ruling on their Review Application he participated in a walk-out. To his affidavit he annexed a copy of the letter to the Presiding Judge – Criminal Division and confirmed the contents of the 2nd accused affidavit.

24. The application was opposed by the prosecution through a Replying Affidavit sworn by Mr. Charles Okeyo the Prosecution Counsel, in which he deposed that so far fourteen (14) witnesses had testified before the court and only technical witnesses were remaining and therefore the application was a ploy by the accused person to delay its completion hence causing injustice to the victims' family. It was deposed that the grounds advanced were actually baseless, frivolous and not grounded on any sound law.

25. It was contended that any mentions or utterances by a judicial officer in the cause of proceedings, but not forming part of the record in those proceedings cannot be said to form an opinion and nay decision to convict or acquit is based on the evidence by witnesses and or any other documentary evidence similar to the decision to deny or allow bail was also based on the circumstances underlying each case and cannot form a basis for recusal.

SUBMISSIONS

26. On behalf of the 1st accused Mr. Wachira submitted that he was of the strong view that the court was impartial and had acted in a manner likely to cause him not to get justice. He submitted that the legal position is that the grounds must not be baseless or flimsy. He submitted that the accused felt that the court was very punitive on making ruling on the issues of bail and has been bias towards him as there was no compelling reason why the court had compelled him to suffer in remand for five years. He submitted that he did not feel that his constitutional rights will be guaranteed by the court on account of its ruling to deny him bail. He reiterated the contents of the applicant's affidavit that the court had been giving the prosecution preferential treatment.

27. Mr. Olando on behalf of the 2nd accused submitted that the court had been favouring the prosecution than the accused persons, which made him lack comfort on the court with regard to the principles of fair trial and in the circumstances making the him lose faith in the court.

28. Mr. Ongaro on behalf of the 3rd accused submitted that the court was being asked to step out of its mind and look at the accused application as a man in the street. He placed reliance on the Judicial Code of Conduct Rule 10(1) and stated that the 3rd accused was apprehensive that the court will not bring an open mind in the matter because the court was bias. He submitted that the court is called upon to determine whether it's bias or had breached the rights of the 3rd accused. He submitted that the test of bias was set out in the case of **FACON PRIVATE BANK LTD v BORRY BERNARD EDWARD CHARLES LTD & ANOTHER HONGKONG SPECIAL ADMINISTRATIVE REGION CACU 42/2013** to the extent that the court must ascertain circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead to a fair-minded and informed observer to conclude that there was a possibility or a real danger, the two being the same that the tribunal was biased.

29. He submitted further that whereas the Judge ought to be wary of forum shopping by its nature, it is only in cases where recusal is required, the Judge must find it in his mind necessary to continue with the case when they have been criticized. If there is a real possibility that bias might be apprehended this must be taken into account and another Judge must take over even if there is likelihood of forum shopping.

30. Mr. Wakaba on behalf of 4th accused and Mrs. Nyamongo on behalf of the 7th accused supported the submissions by Mr. Wachira and Mr. Ongaro.

31. Mr. Okeyo for the prosecution submitted that the main issue touching on the biasness was based on the ruing of the court in which the application for bail was denied by the court. He stated that when an application for bail is denied, that does not amount to bias on the part of the judicial officer. The fact that the court denied bail with reasons does not indicate that the court had formed an opinion of what it will do at the end of the trial and therefore that ground was baseless. He submitted further that the allegations contained in the applicants' affidavit does not form part of the evidence tendered before the court and the court record.

32. It was submitted further that the allegation contained in the affidavits by the application were baseless since all cases are determined on their own merit. He submitted that the applicants wrote to the Presiding Judge of the Division upon being denied bond because they were angry and frustrated by the decision of the court which was based on the court's discretion. He submitted that the court was called upon to balance and look at the victim as well as the accused persons and whether the recusal by the court will accord justice to the parties herein. He contended that the application was only meant to frustrate the victim's family by either trying to scuttle or delay the case.

33. In a rejoinder, Mr. Wachira submitted that the application was made in good faith and was not made immediately the trial started but after four years when the issue of biasness was created in the mind of the 1st accused. Mr. Olando submitted that it is the grounds of the denial of bail that led to the belief of bias. He submitted that the matter had not been proceeding because of adjournment on the part of the prosecution. Mr. Ongaro stated that the victim's family were represented by an Advocate who did not attend the hearing of the application, he stated that the 1st and 2nd accused walked out of the court to express their displeasure with the same. Mr. Wakaba submitted that the applicants were exercising their right under Article 50(1) of the Constitution. Mrs. Nyamongo submitted that the 7th accused was not given fair hearing as his application was not determined on its merit but lumped together with others.

ANALYSIS AND DETERMINATION

34. The law on recusal of a court from a case is fairly settled in Kenya as in other Common Law Nations. The starting point will be the case

of METROPOLITAN PROPERTIES (FG-C) LTD VS. LANNON & OTHERS [1969] 1 QB 577, the test applied by Lord Justice Edmund Davis stated that:

“Disqualification was imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias.”

Acker LJ in *R vs Liverpool City Justices, ex parte Topping* [1983] 1 WLR 119 elaborated on the test applicable. 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 was not possible. If the answer is in the affirmative, disqualification will be inevitable.

35. The Constitutional Court of South Africa had this to say on the issue of recusal of a judge in PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA VS. SOUTH AFRICA RUGBY FOOTBALL UNION (1999) (4) SA 147 at page 177:

“.....the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.”

36. In Kenya, in the case of JASBIR SINGH RAI & 3 OTHERS VS. TARLOCHAN SINGH RAI & 4 OTHERS (2013) @ KLR, Supreme Court of Kenya Petition No. 4 of 2012, *Hon. Justices P. K. Tunoi, J. B. Ojwang, N. S. Ndungu, M. K. Ibrahim and S. Wanjala (JJSC)* had this to say;

“[6] Recusal as a general principle, has been much practised 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.

[10] In *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.1)* [2000] 1 A.C. 6, the English House of Lords [now the Supreme Court] had just rendered a judgment when it became known that a member of the collegiate Bench involved, was an unpaid director and chairman of Amnesty International Charity Limited, an organization set up and controlled by Amnesty International; and the same member’s wife was also employed by Amnesty International. In the said judgment, it had been held that General Pinochet, the Chilean Head of State, was not immune from arrest and extradition, in relation to crimes against humanity which he was alleged to have committed while in office. The House of Lords, at the commencement of the hearing, had given permission for Amnesty International to join in as intervener. A newly constituted Bench of five Judges held unanimously that the earlier judgment must be set aside, because one of the members of the Bench should have been disqualified from hearing the case; as that member had had an interest in the outcome of the proceedings.

[11] In an American case, *Perry v. Schwarzenegger*, 671 F. 3d 1052 (9th Circ. February 7, 2012) it was held that the test for establishing a Judge’s impartiality 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...”

37. Further, in the case of PHILIP K. TUNOI & ANOTHER VS. JUDICIAL SERVICE COMMISSION & ANOTHER [2016]eKLR, the Court of Appeal in considering an application for recusal stated:

In Tumaini v. R. (supra) Mwakasendo J held, rightly in our view, that:

“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 House of Lords held in *R v. Gough* [1993] AC 646 that the test to be applied in all cases of apparent bias was the same, whether being applied by the Judge during the trial or by the Court of Appeal when considering the matter on appeal, namely whether in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand.

The test in *R v. Gough* was subsequently adjusted by the House of Lords in *Porter v Magill* [2002] 1 All ER 465 when the House of Lords opined that the words “a real danger” in the test served no useful purpose and accordingly held that –

‘[The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.]’

38. In the case of *KIMANI VS. KIMANI* [1995-1998] VOL.1 EALR page 134 the Court of Appeal allowed an appeal on the ground that the presiding judge had exhibited a biased attitude towards women in general. The court noted as per *Justice Lakha* that the correct test to apply is whether there is the appearance of bias rather than whether there is actual bias. This was a case with regard to a dispute between man and wife over property acquired during the subsistence of a marriage which was subsequently dissolved. In this case, the remarks by *Tunoi, JA* in *REPUBLIC VS. DAVID MAKALI & 3 OTHERS*, above, in which he applied Lord Denning’s principles in the *LANNON* case (supra) were applied with equal force. That the same principles are applied over such wide ranging fields only goes to show how widely accepted they are so that in dealing with the issue of disqualification of a judge or any other judicial or quasi-judicial officer on the ground of alleged bias, the court hearing the matter is not, indeed it cannot, go into the question of whether the officer is or will be actually biased. All the court can do is to carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair-minded person would do, that the judge is biased or is likely to be biased. Again, as *Tunoi JA*, pointed out, sight must not be lost of the fact that losing litigants might be more inclined to explain their loss on the alleged wickedness of other people rather than on the weakness of their own case. It is these considerations that have led to injunctions such as that judges ought not to be too ready to disqualify themselves lest there be found no judge available to deal with certain types of cases, particularly those involving parties who are constantly in the courts over one sort of dispute or another.

39. Justice Odunga in the case of *REPUBLIC v PAULINE MAISY CHESANG & 4 OTHERS* [2019] eKLR summarized the law in the following manner which I associate myself with and shall have nothing useful to add thereto and for record purposes and at the risk of repetition as regards authorities quite in full as follows:-

“34. The foundation for the principle underlying recusal of judicial officers was restated by the Supreme Court in *Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012* [2013] eKLR as follows:

“Recusal, as a general principle, has been much practised 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 ed. (2004) [p.1303]: “Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest.” 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.”

35. The principles relating to recusal were discussed in details in the *President of the Republic of South Africa vs. The South African Rugby Football Union & Others Case CCT 16/98*, in which the Constitutional Court of South Africa pronounced itself as follows:

“At the very outset we wish to acknowledge that a litigant and her or his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is counsel’s duty to advance the grounds without fear. On the part of the judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his [or her] recusal as a personal affront...A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes...In applying the test for recusal, courts have recognised a presumption that judicial officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare judges for the often difficult task of fairly determining where the truth may lie in a welter of contradictory evidence...This consideration was put as follows by Cory J in *R. v. S. (R.D.)*:37

‘Courts have rightly recognized that there is a presumption that judges will carry out their oath of office...This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with cogent evidence; that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias.’

In their separate concurrence, L'Heureux-Dube and McLachlin JJ say:38

‘Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings before administrative tribunals, judicial decision-makers, by virtue of their positions, have nonetheless been granted considerable deference by appellate courts inquiring into the apprehension of bias. This is because judges are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances=: United States v Morgan, 313 U.S. 409 (1941) at p. 421. The presumption of impartiality carries considerable weight, for as Blackstone opined at p. 361 in Commentaries on the Laws of England III . . . [t]he law will not suppose possibility of bias in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. Thus, reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect: R. v. Smith & Whitway Fisheries Ltd. (1994), 133 N.S.R. (2d) 50 (C.A). at pp. 60-61.’

The test should be applied on the assumption that a reasonable litigant would take these considerations into account. A presumption in favour of judges' impartiality must therefore be taken into account in deciding whether such a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be biased.”

36. The Court then proceeded to pronounce itself as follows:

“Absolute neutrality on the part of a judicial officer can hardly if ever be achieved. This consideration was elegantly described as follows by Cardozo J:41

‘There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them - inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs... In this mental background every problem finds it[s] setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own...Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether [she or he] be litigant or judge.

It is appropriate for judges to bring their own life experience to the adjudication process. As it was put by Cory J in R. v. S. (R.D):42

“It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging.’

Similar considerations were expressed in their concurring judgment by L'Heureux-Dube and MacLachlin JJ:43

‘[Judges] will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the judiciary. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging...It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function.’”

37. Relying on Committee for Justice and Liberty et al vs. National Energy Board the Court agreed that:

“...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information...[The] test is what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude.”

38. It was further held that:

“An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application.

It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test... We are in full agreement with the following observation made by Mason J in a judgment given by him in the High Court of Australia [In Re J.R.L.:Ex parte C.J.L. (1986) 161 CLR 342 at 352.]:

“Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour...It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party.” [Emphasis mine].

39. On the views held by judges the Court held:

“It has never been seriously suggested that judges do not have political preferences or views on law and society. Indeed, a judge who is so remote from the world that she or he has no such views would hardly be qualified to sit as a judge. What is required of judges is that they should decide cases that come before them without fear or favour according to the facts and the law, and not according to their subjective personal views. This is what the Constitution requires.”

28. In conclusion, the Court decreed:

“It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training...and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial...Under our new constitutional order, judicial officers are now drawn from all sectors of the legal profession, having regard to the constitutional requirement that the judiciary shall reflect broadly the racial and gender composition of South Africa. While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour, than would other judicial officers drawn from a different segment of society. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself.”

40. It was similarly held in **South African Commercial Catering & Allied Workers Union & Anor. vs. Irvin & Johnson Limited Sea Foods Division Fish Processing Case CCT 2 of 2000**, where the same Court expressed itself as follows:

“The Court in Sarfu further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in S v Roberts, decided shortly after Sarfu, where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds. It is no doubt possible to compact the double aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:

‘Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity.’

The double unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased even a strongly and honestly felt anxiety is not enough. The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant’s anxieties. It attributes to the litigant’s apprehension a legal value, and thereby decides whether it is such that it should be countenanced in law...The legal standard of reasonableness is that expected of a person in the circumstances of the individual whose conduct is being judged. The importance to recusal matters of this normative aspect cannot be over-emphasised. In South Africa, adjudging the objective legal value to be attached to a litigant’s apprehensions about bias involves especially fraught considerations.

This is because the administration of justice, emerging as it has from the evils and immorality of the old order remains vulnerable to attacks on its legitimacy and integrity. Courts considering recusal applications asserting a reasonable apprehension of bias must accordingly give consideration to two contending factors. On the one hand, it is vital to the integrity of our courts and the independence of judges and magistrates that ill-founded and misdirected challenges to the composition of a bench be discouraged. On the other, the courts very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is as wrong to yield to a tenuous or frivolous objection as it is to ignore an objection of substance... We are aware of the need to prevent litigants from being able freely to use recusal applications to secure a bench that they regard as more likely to favour them. Perceptions of bias or predisposition, no matter how strongly entertained, should not pass the threshold for requiring recusal merely because such perceptions, even if accurate, relate to a consistent judicial "track record" in similar matters or a broad propensity to view issues in a certain way. Recusal applications should never be countenanced as a pretext for judge-shopping."

41. While dealing with the independence of judges, Lord Denning in *What Next in the Law*, at page 310 had this to say:

"If I be right thus far – that recourse must be had to law – it follows as a necessary corollary that the judges must be independent. They must be free from any influence by those who wield power. Otherwise they cannot be trusted to decide whether or not the power is being abused or misused... [The judges] will not be diverted from their duty by any extraneous influences; not by hope of reward nor by the fear of penalties; not by flattering praise nor by indignant reproach. It is the sure knowledge of this that gives the people their confidence in the judges."

42. In our own jurisdiction the issue has been the subject of legal pronouncements. The Court of Appeal in *Uhuru Highway Development Ltd. vs. Central Bank of Kenya & 2 Others Civil Appeal No. 36 of 1996* held:

"Except where a person acting in a judicial capacity had a pecuniary interest in the outcome of the proceedings, when the Court would assume bias and automatically disqualify him from adjudication, the test applied in all cases of apparent bias was whether having regard to the relevant circumstances, there was a real danger of bias on the relevant member of the tribunal in question, in the sense that he might unfairly regard or unfairly regard with favour or disfavour the case of a party to issue under consideration by him: the real test is in terms of real danger rather than real likelihood to ensure that the Court is thinking in terms of possibility rather than probability of bias... Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duties to sit and do not, by acceding too readily to the suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they will have their cases tried by someone thought to be more likely to decide the case in their favour... Although most litigants would much prefer that they be allowed to shop around for judges that would hear their cases, that is a luxury which is not yet available under our law to litigants."

See also *Galaxy Paints Company Ltd. vs. Falcon Guards Ltd. Civil Appeal No. 219 of 1998 [1999] 2 EA 83*.

43. On the same note, the Supreme Court of Uganda in *Uganda Polybags Ltd vs. Development Finance Co. Ltd and Others [1999] 2 EA 337* was of the view that litigants have no right to choose which judicial officers should hear and determine their cases since all judicial officers take oath to administer justice to all manner of people impartially, and without fear, favour, affection or ill will and the oath must be respected.

44. It must be appreciated that in matters of perception the applicant must show that there exists **reasonable perception**. Such reasonable perception in my view must be based on facts and in this case the perception alluded was clearly unreasonable or not. According to *The Bangalore Principles of Judicial Conduct*:

"Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one said or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind, an attitude or point of view, which sways or colours judgement and renders a judge unable to exercise his or her functions impartially in a particular case. However, this cannot be stated without taking into account the exact nature of the bias. If, for example, a judge is inclined towards upholding fundamental human rights, unless the law clearly and validly requires a different course, that will not give rise to a reasonable perception of partiality forbidden by law." [Emphasis added].

45. What I understand by that position that if a Court of law has pronounced itself on a matter and the parties view that as the correct legal position, there ought to be no valid objection to the same Court entertaining a subsequent matter even if similar issues are involved. Where the parties are of the view that the matter in controversy has been decided, save for the option of an appeal where one is provided, parties are expected to order their lives in accordance with the said decision since courts of law are meant to set the law straight so that litigants may predict the outcome of their actions and either avoid taking a particular course or order their lives in accordance therewith. Therefore, where the Court has pronounced itself on a matter, parties to the subsequent proceedings where the legal issues are similar ought not to seek that the same be heard by different judges in the hope of obtaining a different outcome. In *Miller vs. Miller [1988] KLR 555*, the Court of Appeal expressed itself as follows:

"No party should be placed in a position where he can choose his court. But this is not to say that no circumstances is it possible for a judge to disqualify himself from hearing a case... There is nothing prejudicial in one Judge making several or more orders in a court record. In practical terms it is advantageous to the parties and therefore in the interest of justice for a judge to familiarise himself with the substance of a court file. In the absence of the evidence

that the appellant's case was prejudiced by some order of the nine orders the trial judge made, it must be held that the submission on this aspect was without substance. No objection was taken to the trial judge making any of the nine orders...It would be disastrous if the practice was that once there are allegations made against a judge and the judge's honour is in question, that the judge must disqualify himself. The administration of justice through court would be adversely affected since mischievous parties to cases would obtain disqualification by judges with ease and the consequence would be a choice of trial judge by a party."

40. In this matter the applicant's main ground for bias is that the court dismissed the application for review of an order in which they were denied bail/bond. That ruling was based on the law and the reasons contained therein. The initial application as stated in the introductory part of this ruling was handled by Justice Korir and the 2nd fresh application by those who had not made application for bond handled by this court has not been appealed against. It is my understanding of the law that if the applicants felt dissatisfied by the ruling of 21st of May, 2019, they had a right of appeal to the Court of Appeal. The denial of review cannot constitute a ground for bias real, preserved or apprehended and I therefore find and hold that this ground is very baseless and not supported by any fact whatsoever.

41. In this holding, I associate myself with the court sentiment in the case of **ATTORNEY GENERAL v ANYANG NYONGO & OTHERS [2007] 1 EA 12** where the court held thus: -

"The court must guard against litigants who all too often blame their losses in court cases to bias on the part of the Judge. Success or failure of the government or any other litigant is neither ground for praise or for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them. There is a fundamental tendency for the decisions of the Courts with which there is disagreement to be attacked by impugning the integrity of the Judges, rather than by examining the reasons for the judgement. Decisions of our courts are not immune from criticism but political discontent or dissatisfaction with the outcome of the case is no justification for recklessly attacking the integrity of judicial officer...An application brought more out of a desire to delay the hearing of the reference than a desire to ensure that the applicant receives a fair hearing is tantamount to abuse of court process...It is indisputable that different minds are capable of perceiving different images from the same facts. This results from diverse facts. A "suspicious mind" in the literal sense will suspect even where no cause for suspicion exists and unfortunately this is a common phenomenon among unsuccessful litigants and that is why the mind envisaged in the test to determine perception of possible or likely bias on the part of the Judge is a reasonable, fair and informed mind.....While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers merely because they believe that such persons will be less likely to decide the case in their favour." (emphasis added)

42. On the other allegation made by the applicants in their affidavit in support, including the allegations that the court has delayed the conclusion of their matter the court has been favouring the prosecution and the conviction rate of the court, the records of the proceedings in this matter have been set out at the introductory part of this ruling and the same speaks for itself. This is a matter in which the accused persons are represented by six Advocates and each of the Advocates have been cross examining prosecution witness if and when the same are called. The court has fixed hearing dates as per the available dates on the court calendar, the record of the proceedings herein is availed to the accused persons who according to their Advocates have been taking parties during the trial. This is not the only matter which this court has been handling exclusively and the same had been treated at arm's length and equitably with the other cases and therefore the allegations of bias or favour as alleged has got no basis.

43. The other grounds stated by the application save for the main ground of the dismissal of their application for review, as stated by Mr. Okeyo are reckless and void of any reason as they are allegedly related to other matters and files which have been handled by this court without any connection to the applicants' case and does not form part of the record of the proceedings herein. The applicants have as regards their trial before the Lower Court not denied that they also staged a walk out before the Chief Magistrate at Milimani who was thereafter asked by them to recuse himself which he did. It is on record that fixing dates before this court in respect of this trial has always taken into account their trial dates before the lower court and therefore this court rejects the suggestion that an appearance of bias arose by reason of pointing that out. As regards the conviction rate of the court as alleged there is no evidence features that the said convictions have not been based on law and evidence and have been overturned at appeal there is no evidence tendered to show that the accused persons herein are unlikely to be the fifth acquittal by the court.

44. As stated by Mr. Olando, the accused have always participated in their trial or as submitted by Mr. Wachira, waited until the court dismissed their application for review, which ruling as stated herein above has not been subjected to any appeal so that its correctness may be faulted. There is no legitimate expectation on the outcome of a ruling to be in favour of the application. In my view a fair minded and informed observer would not consider that there is anything in the way in which I have dealt with this case which gives a real or persevered appearance or possibility of bias or lack of impartiality even if one was to extend the limb of imagination too far.

45. Applying the objective test as stated in the authorities herein and being alive to the Bangalore principles where bias or prejudice is defined as a leaning, inclination, bend or predisposition towards one side or another or a particular result and a condition or state of mind, an attitude or point of view which sways or colours judgment and having stated that the applicants' main ground is that they were not granted bail, I find that there is no ground that can support the applicants' application for recusal and the application herein is misplaced with the sole purpose of derailing the path of justice

46. In **DOBBIS V TRIDOS BANK NV [2005] EWCA CIV 468 Chadwick LJ** observed as follows: -

"7. It is always tempting for a Judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the Judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not want, lack confidence in the Judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a Judge to resist the temptation to recuse himself simply because it would be more comfortable to do so.

The reason is this, if Judges were to recuse themselves wherever litigants whether represented litigants or a litigant in person- criticized them (which sometimes happens, not frequently) we would soon reach the position in which litigants were able to select Judges to hear their cases simply by criticizing al the Judges that they don't want to hear their cases. It would be easy for a litigant to produce a situation in which a Judge felt obliged to recuse himself simply because he had been criticized – whether that criticism was justified or not.”

47. I have chosen the path of rejecting the applicants' criticism and is ready and willing to proceed with this matter to its conclusion if the prevailing conditions allow and that is why I have dismissed the applicants by the applications which they deserve.

48. Having considered the applicants' grounds separately and in the round, I am confident that a fair minded and objective informed observer would apprehend no real or apprehended bias or impartiality or danger of the same on the part of the court. There being no proper grounds for recusal, I hereby dismiss the application herein as lacking merit and it is ordered.

49. Having dismissed the said applications, I have taken into account the following factors as regards this case: -

- a. The accused persons save for the 5th and 6th walked out of the court immediately the ruling was delivered as has been confirmed by all of them in their affidavits in support and by their Advocates on record.
- b. Since the said date of the walk out, this court has not been able to conduct any meaningful trial in this matter due to the conduct of the accuse persons, as the record shows.
- c. The Applicants have confirmed having caused a letter of complaint against the Judge to be written to the Judicial Service Commission by themselves and three other sets of accused persons who have their cases pending before this court which matter might be alive before JSC.
- d. The applicant having further caused a letter to be written to the Presiding Judge of this Division stating clearly that they prefer their matter to be handled by any other Judge in the Division save for this court and
- e. Having shown remarkable disrespect to the court and made false and unfounded allegations against the character of the court which are defamatory in nature: -

It will not be possible for this court to conduct a meaningful trial against the accused persons without the same being excluded from attending their trial against their constitutional right, therefore in the interest of the two accused persons who wishes their matter to proceed to conclusion and the families of the victims, I here by direct that this file be placed before the Presiding Judge of the Division for re-allocation to another Judge for trial and determination.

Dated, signed and delivered at Nairobi this 9th day of July, 2020 through Microsoft Google Teams.

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J. WAKIAGA

JUDGE

In the presence of:

Mr. Okeyo for the State

Mr. Mathenge for Wachira for the 1st accused person

Mr. Olando for the 2nd accused person

Mr. Ongaro for the 3rd accused person

Mr. Mathenge for Mr. Wakaba for the 4th accused person

Mr. Mathenge for Ms Nyamongo for the 5th accused person

Mr. Mathenge for the 6th accused person

Mr. Mathenge for Nyamongo for the 7th accused person

All the seven Accused persons present

Karwitha – Court Assistant