



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CRIMINAL APPLICATION NO. 105 OF 2018

PHYLIS WAIRIMU KONCHELLA.....APPLICANT

VERSUS

REPUBLIC1ST RESPONDENT

DAVID KAMAU WACHIRA.....2ND RESPONDENT

RULING

1. Through an application dated 6th August, 2018 brought under the provisions of Articles 22 and 50 of the Constitution of Kenya and Section 81 of the Criminal Procedure Code, the applicant seeks the following orders:-

- (i) That this Honourable Court do order Shanzu Criminal Case No. 1020 of 2015 to be heard and determined in a different and/or other court;
- (ii) That this Honourable court be pleased to issue such orders as may be fair and just to ensure and guarantee the applicants rights to free and fair trial;
- (iii) That this Honourable court do set aside the order issued on 12th April, 2018 in Shanzu Criminal Case No. 1020 of 2015 for payment of witness expenses of Ksh. 10,000/= by the applicant; and
- (iv) That the costs of this application be in the cause.

2. Mr. Odundo for the applicant relied entirely on the affidavit in support of the application. Ms Marindah relied on her grounds of opposition. Both Counsel left it to this court to peruse the said documents and deliver a ruling.

3. The affidavit in support of the application was sworn on 6th August, 2018 by the applicant, Phylis Wairimu Konchella. She deposed in her affidavit that she is the 1st accused in Shanzu Criminal Case No. 1020 of 2015. She annexed a charge sheet to that effect to her affidavit.

4. The gist of her complaint as deduced from her affidavit is that on 12th April, 2018, the Trial Magistrate Hon. D. Mochache, Senior Principal Magistrate, ordered her to pay witness expenses in the sum of Kshs. 10,000/= to a Government Examiner (sic) who is a witness for the prosecution.

5. In paragraph 3 of the said affidavit, the applicant deposes that the Hon. Magistrate has showed open bias in her manner of handling the matter as on various occasions she disallowed objections raised by her Advocate arising from interference in court by an interested party who is not the complainant.

6. The applicant further avers that the Hon. Magistrate refused to recuse herself after declining to allow the complainant to withdraw the case in court. A copy of ruling from the said court is attached to the applicant's affidavit.

7. The complainant expressed the fear that she will have a fair and impartial trial before the said court. She prayed for the case to be transferred to another court.

8. Ms Marindah, Prosecution Counsel, filed grounds of opposition on behalf of the 1st respondent. The said grounds in my view, are more of submissions. She stated that the application herein is misconceived and an abuse of the court process as it lacks any legal backing

necessitating the orders being sought. It was contended that the application is based on speculation, is meant to defeat the ends of justice and as such, the orders sought are improper, untenable and incapable of being granted.

9. The grounds of opposition expound that the test to be applied in an application for recusal of a Magistrate ought to be an objective one and that there is need to consider if there is a reasonable ground for assuming the possibility of bias. It was argued that consideration must be made to ascertain if the said perception is likely to produce in the minds of the public at large, a reasonable doubt about the fairness of the administration of justice.

10. It was further stated that the facts constituting bias must be specifically alleged and established which the applicant has failed to do. The grounds of opposition further indicate that there is nothing that demonstrates hostility on the part of the Hon. Magistrate in her ruling as she had to address the factors surrounding the adjournment that was sought by the applicant since her Advocate was not in court.

11. On the issue of the proposal by the complainant to withdraw the case, Ms Marindah relied on the provisions of Section 204 of the Criminal Procedure Code which requires the court to be satisfied that there are sufficient grounds on which the complainant is relying on, to withdraw a complaint before allowing such an application. These include reasonable grounds and sufficiency for withdrawal of the case. In the Prosecution Counsel's view, a third party, PW2, stands to be prejudiced, if the court allowed withdrawal of the case. Further, that the DPP is not obliged to withdraw a case merely because the applicant who is one of the witnesses had a change of heart, if the view of the DPP was that investigations had yielded a sustainable case and there were more victims to the crime, as in the instant case.

12. In conclusion, Ms Marindah submitted that the exercise of a court's discretion to adjourn any matter is a consideration that is done on a case to case basis. She supported and justified the order made for the applicant to pay costs to the Document Examiner.

ANALYSIS AND DETERMINATION

The issues for determination are:-

- (i) If the award of costs before the case was finalized was proper; and
- (ii) If the Hon. Magistrate exhibited bias as against the applicant.

Costs

13. I have perused the ruling of Hon. D. Mochache of 22nd June, 2018. Her reasons for making the order for the applicant to pay Kshs. 10,000/= to the Document Examiner are well explained. The applicant herein failed to attach copies of the lower court proceedings for this court to follow the events that unfolded before the Hon. Magistrate made the said orders. What can be gleaned from the ruling is that a hearing date was taken by consent of the parties in court, but Counsel for the applicant not only failed to attend court, but armed with the knowledge that he would not be available, he failed to inform the Prosecution Counsel of his non-availability. The Document Examiner therefore traveled from Nairobi from Mombasa for the hearing of the case.

14. In the Hon. Magistrate's view, the Document Examiner fueled a Government vehicle from Nairobi to attend the hearing, thus she awarded him an amount of Kshs. 10,000/=. The said order in my view was made in good faith and I see no bias against the applicant. The Hon. Magistrate was out to demonstrate the importance of the applicant and her Advocate to attend court on the dates assigned for hearing of the case before the lower court.

15. The problem I have with the order for the Kshs. 10,000/= being paid to the Document Examiner to fuel his vehicle is that the provisions of Section 171(1) of the Criminal Procedure Code were not followed. The said provisions state as follows:-

A judge of the High Court or a magistrate of a subordinate court of the first or second class may order a person convicted before him of an offence to pay to the public or private prosecutor, as the case may be, such reasonable costs as the judge or magistrate may deem fit, in addition to any other penalty imposed.

16. The above provisions clearly indicate that any order for costs should be made after a conviction has been entered against an accused person. In the present case, the order for the applicant to pay the sum of Kshs. 10,000/= to the Document Examiner was made before the case had been finalized. In any event, fuel consumption for Government vehicles must be duly documented and accounted for and the journey captured on a work ticket. Payment of the sum of Kshs.10,000/= directly to the Document Examiner would raise accounting issues as payment of such money is required to be made to the Parent Ministry in which the Document Examiner is attached. It is the Parent Ministry which would know how to treat the said award of costs in its books of accounts. The accounting for such money would then be in accordance with the Public Finance Management Act.

17. Since the said order was made prematurely and the correct procedure was not followed, in exercise of the supervisory jurisdiction of this court as provided under the provisions of Article 165(6) and (7) of the Constitution of Kenya, I hereby reverse the decision of the Hon. Magistrate and order that the sum of Kshs. 10,000/= be refunded to the applicant.

Allegation of bias

18. The applicant raised the issue of bias on the part of the Hon. Magistrate and sought transfer of the lower court case to another court. In **Shilenje vs Republic** [1980] KLR 132, Trevelyan J, citing Sir John Woodroffe's Criminal Procedure in British India, set out the principle of impartiality in the following terms at pages 612 and 613:-

“This clause deals with the case in which the High Court is satisfied that a fair and impartial inquiry cannot in fact be had, but such cases are rare for to move a case from one magistrate to another on grounds personal to him is tantamount to a severe censure of such officer and the very clearest grounds must exist before the High Court will interfere.....A more ordinary class of cases is that in which, although the High Court is not itself of opinion that a fair and impartial inquiry cannot be had yet a party has reasonable grounds for the apprehension that he will not have fair trial which is another matter. It is not sufficient that justice is done; but it must also appear to have been done. The law in such a case has regard to not so much to the motive which might be supposed to bias a judge as to susceptibilities of the litigant parties. One important object is to clear away everything which might engender suspicion or destruct of the tribunal and thus to promote the feeling of confidence in the administration of justice which is essential to social order and security.....The transfer of a case will therefore be granted not on the ground that the judicial officer is incapable of performing his duty, but simply to allay the apprehension of the applicant for transfer. The question in such case is not whether there is actual bias.....but whether there is reasonable ground for suspecting bias....and whether incidents may not have happened which, though they might be susceptible of an explanation and may have happened without there being any real bias in the mind of the judge, are nevertheless such as are calculated to create in the mind of the parties to the action of the magistrate.....Abstract reasonableness, however, ought not to be the standard....” (emphasis added).

19. The above must be read alongside the provisions of Section 81 of the Criminal Procedure Code which provide as follows:-

(1) Whenever it is made to appear to the High Court-

(a) That a fair and impartial trial cannot be had in any criminal court subordinate thereto; or

(b) That some question of law of unusual difficulty is likely to arise; or

(c) That a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the offence; or

(d) That an order under this section will tend to the general convenience of the parties or witnesses; or

(e) That such an order is expedient for the ends of justice or is required by any provision of this Code,

it may order-

(i) That an offence be tried by a court not empowered under the preceding sections of this Part but in other respects competent to try the offence;

(ii) That a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to another criminal court of equal or superior jurisdiction;

(iii) That an accused person be committed for trial to itself.

(2) The High Court may act on the report of the lower court, or on the application of party interested, or on its own initiative.

(3) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Director of Public Prosecutions, be supported by affidavit.

(4) An accused person making any such application shall give to the Director of Public Productions notice in writing of the application, together with a copy of the grounds on which it is made, and no order shall be made on the merits of the application unless twenty-four hours have elapsed between the giving of notice and the hearing of the application.

(5) When an accused person makes any such application, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the costs of the prosecutor.” (emphasis added).

20. The extract referred to in paragraph 18 of this ruling and the above legal provisions demonstrate that an applicant who alleges bias or partiality against a Judge or Judicial Officer has to meet a high threshold to prove such allegations. Additionally, the same must be borne by facts on the face of the court record. I fail to see any such bias in the lower court case record that forms the subject of this application. The decision to transfer a case cannot be done whimsically but must be grounded on a solid basis.

21. This court's attention was drawn to the failure by the Hon. Magistrate to recuse herself from hearing the lower court case. The applicant must be made aware that when the Hon. Magistrate sat to hear the matter that was before her, she sat as an arbiter and did not sit to please any part of the divide. Applications made by either of the parties to the case before her, call for her to apply the law to the facts and where discretion is required, to exercise her discretion judiciously. This court would not interfere with the exercise of the Hon. Magistrate's discretion unless it is proved that she did not act judiciously.

22. In the **President of the Republic of South Africa and Others vs South African Rugby Football Union and Others** (SARFU) the court stated thus on the issue of impartiality and recusal of a court:-

“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.”

23. The factors that a court must apply before recusing itself as seen from the above decision is whether an applicant has shown to the satisfaction of the court that there is a likelihood of bias arising in respect to a given party and the preconceived views on the subject matter in dispute. The applicant herein has been unable to prove the foregoing factors. I therefore find no merit on the allegation of bias leveled against the Hon. Magistrate. I therefore decline to transfer the lower court case from Hon. Mochache, SPM, Shanzu Law Courts, to another court.

24. The final orders are that:-

(i) The sum of Kshs. 10,000/= paid to the Document Examiner by the applicant towards his court attendance, shall be refunded to her;

(ii) Shanzu Senior Principal Magistrate's Court Criminal Case No. 1020 of 2015 shall be heard by Hon. D. Mochache, SPM to its logical conclusion, during her tenure at Shanzu Law Courts.

(iii) The said Hon. Magistrate shall on receipt of this ruling proceed to list the lower court case for mention, for purposes of giving a hearing date.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 8th day of February, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the applicant

Ms Ogwen for the respondent

Mr. Oliver Musundi - Court Assistant