



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL REVISION NO. 99 OF 2018

RAPHAEL SAUTI WANJALA.....1ST APPLICANT

MBAGATUZINDE GERO.....2ND APPLICANT

JOHN KECHULA OKOTA.....3RD APPLICANT

ALFRED WESONGA SIDUWA.....4TH APPLICANT

PETER NAMAKHABWA OTUONA.....5TH APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicants moved the court by way of Notice of Motion under Articles 22(1), 23(1), 40(1), 50, 50(2) (a), 165 (6) & (7), 159 (1) & (2) and 258 (1) of the Constitution of Kenya and sections 124, 125, 126, 177(a), 362 and 364 of the Criminal procedure Code. They are seeking the following orders:

- a) That this application be certified urgent and the same be heard and determined on priority basis;
- b) That this court call for and examine the record in the chief Magistrate's Court Criminal Case No. 606 of 2018 and revise, review and set aside the decision of the trial magistrate delivered on 6th November, 2018.
- c) That this court issues an order for Hon. Chepseba to recuse himself from the conduct of the case in issue.
- d) That the matter to be transferred to another court station other than Busia.
- e) That the applicant be awarded costs.

2. The application was premised on eleven grounds which I have summarized as follows:

- a) That the learned trial magistrate, Hon. Chepseba has on numerous occasions shown open bias against the applicants in his actions and statements he has made both in open court and in chambers.
- b) That the learned trial magistrate, Hon. Chepseba has exhibited a hostile attitude against the applicant's advocates in his actions and the statements in both open court and in chambers.
- c) That the learned trial magistrate has demonstrated bias and lack of care for the rule of law and due process, where despite alteration being irregularly made to the record and the issue being brought to his attention, he nonetheless declined to take it up and address it or record the applicants' advocates' complaints.
- d) That the trial magistrate cannot be deemed as an impartial arbiter.
- e) That if Hon. Chepseba continues to hear the matter, the applicants would be exposed to actual bias.

f) That unless the matter is heard by another magistrate, the applicants would be prejudiced.

3. The application was opposed by the state through M/s Ngari learned counsel who argued this the applicants ought to have appealed against the order complained of.
4. Though the applicants have asked this court to call for the lower court record, their application before court is bare. Other than the supporting affidavit of Hon. Raphael Wanjala and copies of letters of complains, there is no copy of record of the lower court.
5. The supporting affidavit has raised very serious issues against Hon. Chepseba and Hon. Nanzushi. To enable the respondent adequately address these allegations, it was incumbent upon the applicants to serve the respondent with a copy of the record. Equally, for this court to address itself to the issues raised, I would have expected to have a record of the proceedings that have given rise to this application. The applicants cannot expect this court to make a decision based on their supporting affidavit only. Certainly, this is a dangerous approach. This may be tantamount to rendering a decision by hearing only one side.
6. It would appear like the applicants are forum shopping. If we assume that they have genuine complaints against the Hon. Chepseba and Hon. Nanzushi, this does not call for transferring the case to another court station.
7. An allegation of alteration of the consent is a very serious one. The applicants must demonstrate that the learned trial magistrate altered the consent the parties entered and included some matters that were not agreed upon by the parties. It is not enough to allege.
8. The issue of recusal is an issue that goes to the core of fair trial. The ruling that aggrieved the applicants was not attached in the application. One wonders how the court is expected to review the same.
9. I have noted that the advocates for the applicants expected the lower court to act on some letters to address the issue of bond. Bond matters are judicial. An applicant may make an oral application for variation of terms so long as it is done in open court. This is to allow the respondent to make a response thereto. It may also be made through a formal application but certainly not through letters the way the applicants' counsel did. No court would conduct judicial affairs through letters. Letters are for administrative issues only.
10. From the foregoing, I find that I have no basis to grant the orders sought. The application is therefore dismissed. The trial in Busia Criminal Case No. 606 of 2018, shall proceed to hearing.

DELIVERED and SIGNED at BUSIA this 4th day of February, 2019

KIARIE WAWERU KIARIE

JUDGE