REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC CRIMINAL APPLICATION NO. 67 OF 2018

JORUM KARIUKI NJUGUNA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Arising from Limuru Chief Magistrate's Court Criminal Case No.404 of 2015)

R U L I N G

1. Before me is the Chamber Summons filed on 9th August, 2018. By the summons, the Applicant sought an order that this Court be pleased to hear and determine this application pursuant to Article 50(1) of the Constitution of the Republic of Kenya 2010.

2. Jorum Kariuki Njuguna swore the affidavit in support of his application. He deposed that he is charged with the offence of Robbery with violence contrary to Section 296(2) of the Penal Code at Limuru SPM's Court Criminal Case Number 404 of 2015. He contended that every person has a right to have a dispute decided in a fair and public hearing before a court or in another independent and impartial tribunal or body.

3. He prayed for his case to be transferred from the said Limuru Court to any other court of similar jurisdiction. For reasons that the trial Magistrate has refused to invoke Section 150 of the Criminal Procedure Code even after several applications to recall **PW1** for cross examination, has refused to compel the prosecution to provide him with essential documents enable his defence contrary to Article 35(1) of the Constitution, has denied him a translator contrary to Article 50(2)(m) of the Constitution and lastly that the trial court has been proceeded to receive evidence even when he was not ready or feeling unwell.

4. The Director of Public Prosecutions filed grounds of opposition together with submissions. It was the DPP's position that the application is without merit as the applicant has not demonstrated sufficient grounds to warrant transfer of his case to a different court of similar jurisdiction and lastly that the application does not meet the necessary test applicable where bias is alleged.

5. The Applicant in his submissions stated that he had sought the invocation of Section 150 of the Criminal Procedure Code after he realised that the evidence of **PW1** was contradictory and inconsistent, but his Application was ignored by the trial court. He contended further that the language used during his plea taking was English, a language he is not conversant with and he was not accorded an interpreter. It was the Applicant's submissions that the trial court has on occasions proceeded with the trial even when he is not ready or feeling unwell.

6. Further, he urged this court to exercise its jurisdiction to transfer this matter to any court of similar jurisdiction. He cited several cases among them the case of ***Regina v Sussex Justice Exparte MC Carthy 1924 HLB 256 IT, Erick Cheruiyot Kotut v Republic (2006) eKLR and Republic v Subordinate Court of the 1st class Magistrate & Another Exparte Youngidar Pall Sennik & Another (2006) eKLR*** to emphasise the need to safeguard the right to a fair trial.

7. In the DPP's submissions, the reasons advanced by the Applicant do not meet the objective test of reasonable apprehension of bias. The DPP cited the case of ***Kinyatti v Republic (1984) eKLR and Philip K.Tunoi & Another v Republic (2016) eKLR*** to support the proposition that the court applies the test and standard of a reasonable person.

8. The court has considered the material canvassed in respect of the application. The crux of the Applicant's complaint is that the court below is biased and that he may not receive a fair trial before the said court. In the case of ***Patrick Ndegwa Warungu Vs. Republic High Court at Milimani Criminal Application No. 440 Of 2003*** Ombija J.in rejecting an application for the transfer of the matter from one judicial officer to another in the Magistrate's Court had this to say:

> **"The principles upon which transfer may be granted has been crystallized in several authorities the leading one being SHILENJE v THE REPUBLIC [1980] KLR 132 which lays down the law that for the High Court to order a transfer there must be reasonable apprehension in the applicant's or any right thinking person's mind that a fair and impartial trial**

might not be had before the magistrate whether one takes the incidences individually or collectively. Concomitantly there must be something before the court to make it appear that it is expedient for the ends of justice that an order for transfer ought to be made."

9. In the case *of* ***Republic v Mwalulu & 8 Others [2005] eKLR ; Court of Appeal Civil Application No. Nai 310 of 2004 (159/2004 UR)*** the Court of Appeal observed that:

"The principles on which a judge would disqualify himself or herself are well known... The Court itself has applied them in various cases such as REPUBLIC Vs. DAVID MAKALI & 3 OTHERS, Criminal Application Nos. NAI 4 & 5 of 1994 (unreported) and in KIMANI Vs. KIMANI reported in the [1995 – 1998] 1 **EA 134**. **In the MAKALI case TUNOI JA who dealt with the issue of disqualification in his judgment, having cited the well-known proposition of LORD DENNING, M.R in the English case of METROPOLITAN PROPERTIES CO. (FG.C) LTD. Vs. LANNON & OTHERS (1969) 1 Q.B. 577, proceeded to summarize the legal position in Kenya as follows: -**

"That being the position as I see it when the courts, in this country are faced with such proceedings as these, [i.e. proceedings for the disqualification of a judge] it is necessary to consider whether there is a reasonable ground for assuming 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. The test is objective and the facts constituting bias must be specifically alleged and established. It is my view that where any such allegation is made, the court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their cases before a court or quasi - judicial tribunal, they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the Judge, Magistrate or Tribunal."

10 **Jorum Kariuki Njuguna** the Applicant herein is the 1st of five accused persons initially charged before the Chief Magistrate's Court Limuru with four counts, the first two being **Robbery with Violence contrary to Section 296(2)** of the Penal Code. And in the alternative a charge of **Handling stolen goods contrary to section 322(1)** of the Penal Code**.** The 3rd and 4th courts are **Rape contrary to section 3(1)** as read with **Section 3(3) of the Sexual Offences Act and Being in Possession of Narcotic Drugs contrary to Section 3(1)** as read with **Section 3(2)** of the **Psychotropic Substances Control Act.** The 3rd Accused pleaded guilty to the 4th count in which he was charged alone and he was sentenced on 11.11.15. An order was made to supply witness statements and evidentiary material to the Accused.

11. The present application is the second one by the same applicant, an earlier one having been made and determined before **Ngugi J** on 14.7.16. At the time, the trial in the lower court case had not commenced. The Applicant had then complained that he had been tortured by police upon arrest. Subsequent to the ruling of this court dated 4.7.16, the 2nd Accused in the lower court died and the charges against him were withdrawn on 10.8.16.

12. It is useful to set out the events that occurred subsequent to the withdrawal. The record reflects a series of adjournments at the request of the prosecution, primarily for reasons that witnesses were unavailable, and that DNA profiling results were delayed. Eventually, after a long hiatus, the hearing commenced before **Olwande SPM** on 10/5/17.**PW1,** a complainant in the robbery counts testified in three different sessions and was cross-examined by the Accused persons.

13. On the next hearing date (30.8.17) the trial court overruled an application for adjournment made by the Applicant on the basis that he did not have the DNA report. On grounds that the case was old and the witness present would not refer to the DNA Report. The court left the door open to having **PW2** recalled for further cross-examination if necessary. At the end of the lengthy testimony of **PW2,** the Applicant addressed the court in the following words when called upon to cross- examine **PW2:**

"I do not want to proceed without the DNA report. I will not ask any questions until I am furnished with the DNA report. I have every right to ask for it and if this court cannot allow that, I want my case to proceed elsewhere"

14. In a subsequent ruling, the court once more reiterated its earlier ruling and directed that the hearing proceeds. None of the other accused persons had questions for **PW2**. At the end of the day's session the Applicant applied that the trial court disqualifies itself as it was biased against him. The court rejected his application. On the next hearing date that fell on 18.10.17 the Applicant applied to recall **PW1** whom he had earlier cross-examined and to recall **PW2** for cross-examination, now that he was in possession of DNA results. The trial court allowed recalling of **PW2** for cross-examination but declined to recall **PW1** stating that no good reasons had been given to justify the request.

15. The prosecution successfully sought adjournment at the next hearing date, on 21.3.18 and after another long hiatus **PW2** appeared, despite her earlier reluctance as communicated by the prosecution, for further cross-examination. On that date (12.7.18) the Applicant claimed to be unwell and not ready to proceed. In its ruling, the trial court was of the view that the Applicant was deliberately delaying case, and reviewing the history of the case rejected the application. Whereupon the Applicant declined to cross-examine the witness.

16. On 9.8.18 the Applicant filed the present application which was also the basis for the application for adjournment made by him before the trial court on 26/9/18. The trial court, observing that there was no order to stay proceedings rejected the application. **PW3** testified. The Applicant refused to cross-examine the witness by stating:

"I had already stated that I will not proceed with this case before this court."

17. The case was slated for further hearing on 14.11.18 at the time of filing the instant application. Although the chamber summons filed herein does not contain any specific prayer, the Applicant's so-called supporting affidavit which was apparently not commissioned, raises a prayer for the transfer of the case to another court at paragraph 5. Paragraph 6 – 8 contain complaints in respect of the trial magistrate's refusal to recall **PW1,** to compel the prosecution to provide the Applicant with so-called essential documents for his defence, to interpretation at the trial and rejection of his application for adjournment.

18. I have reviewed the entire record of the trial in considering these complaints. There is no merit in the complaints contained in paragraphs 6 to 8 of the Applicant's affidavit for the following reasons. The Applicant did cross-examine **PW1** when he testified on 10/5/17. It was not enough for the Applicant to merely demand, without justification to further cross-examine **PW1**. The trial court observed that no proper basis had been laid for such recall and rejected the request. I can find no reason to fault the finding, especially given the age of the case. Further, the fact that the Applicant cross-examined **PW1** and had previously and subsequently communicated with the court in making addresses and objections is evidence that he understood the language of the proceedings. At any rate the record clearly shows the presence of a court clerk at every court session and at no time did the Applicant make any application regarding interpretation.

19. Besides, the trial court appeared to go out of its way in allowing the recall of **PW2,** even though her evidence given earlier, had not touched on the DNA report which at the time was unavailable and which the Applicant claimed to be essential for his case. The record of proceedings on 11/7/18 erroneously stated on the coram as 4.9.18 shows that **PW2** had been reluctant to return to court again and that the prosecutor had to persuade her to attend on 12.7.18. It is relevant that she had testified almost a year earlier when the Applicant refused to cross-examine her, and secondly she is the complainant in the rape charge.

20. The Applicant and the Complainant are both entitled to a fair hearing under Article 50(1) and (2) of the Constitution. Both are entitled to equal protection and equal benefit of the law. Reviewing the conduct of the Applicant since the trial commenced in earnest before the current trial court, it does seem that the Applicant has not been keen to have the trial concluded. His co-accused have been eager to proceed with the matter which is now 3 years old since inception.

21 The Applicant made a choice not to cross-examine **PW2** on two occasions; he cannot blame the trial court for the consequences of his own choices. No evidence was tendered during the second attendance by **PW2** to show that the Applicant was ill, and indeed none has been placed before this court. The Applicant enjoys fair trial guarantees under Article 50 of the Constitution. However, these guarantees cannot be stretched to justify the indefinite recalling of witnesses resulting in unnecessary delays.

22. Does the fact that an application made by an Accused is rejected by the trial court mean that the court is biased or that a miscarriage of justice may occur if the case is heard and determined by the said court? Section 81(1) of the Criminal Procedure Code provides that:

> **"Where it is made to appear to the High Court: −**
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> **(a) that a fair and impartial trial cannot be had in any criminal court subordinate thereto; or**
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> **b .....**
>
> **c ....**
>
> **d .....**
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> **(e) that such an order is expedient for the ends of justice or is required by any provision of this code, ...**
>
> **i) .....**
>
> **ii) that a particular criminal case ... be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction; ....."**

23. In a recent decision in **Lubna Ali Sheikh Abdalla Bajaber and Another v Chief Magistrate's Court, Mombasa and 2 Others [2018] e KLR,** the Court of Appeal delivered itself as follows:

> **"What is bias? An apt definition of 'bias' can be deciphered from the following passage from the judgment of the Court of Appeal in England in *Medicament and related Classes of Goods (2001) 1WLR 700* where the court expressed:**
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> "***Bias is an attitude of mind which prevents the Judge from making an objective determination of the issues that he has to resolve. A Judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of the prejudice in favour of or against a particular witness, which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him."***

Nearer home in *Attorney-General v. Anyang' Nyong'o & Others [2007]1E.A. 12*, the court set the test for bias as follows:

> **"*The objective test of 'reasonable apprehension of bias' is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the public that a Judge did not (will not) apply his mind to the case impartially["] Needless to say, a litigant who seeks [the] disqualification of a Judge comes to Court because of his own perception that there is appearance of bias on the part of the Judge. The Court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case..."***

24. In **Mwalulu's case,** the Court of Appeal stated that the facts constituting bias must be specifically stated and established. The Court

further emphasized that the court ought not to go into the question whether the court against which an order is sought is or will actually be biased. The test is whether there is reasonable apprehension in the Applicant's mind that a fair and impartial trial cannot be had before the said court based on the established facts.

25. These are the principles earlier stated by the Court of Appeal in **Kinyatti V R [1984] e KLR** where the Court having reviewed several leading authorities including the Tanzanian case of **R v Hashimu [1961] EA 656, Brown Shilenje v Republic HC Cr. Application No. 107 of 1976 (U R)** and quoting from **In the matter of an Application by M.S Patel [1913/1914] 5 KLR** stated that;

> **"It was held that the true test for making an order for transfer was not whether or not the magistrate was biased but whether a reasonable apprehension existed in the mind of the accused from incidents which had occurred that he may not have a fair and impartial trial. A transfer was ordered. Hamilton CJ quoting the Calcutta High Court decision in Dupeyron v Driver I LR XXIII Cal. 495 said at page 68:**
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> **"I am not here concerned with an issue as to whether the magistrate was in fact likely to be partial or impartial ... I am perfectly prepared to believe that the accused would have received a fair trial at his hands. But the test to be applied in such cases as this has been settled ... and I would refer particularly to the judgment of the Calcutta High Court in Dupeyron v Driver ... where the judges say:**
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> **"Where the apprehension in the mind of the accused that he may not have a fair and impartial trial is of a reasonable character, there, notwithstanding that there may be no real bias in the matter, the facts of the incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer". The patel case has withstood the test of time and in our view is still the law as the question of transfer of a criminal case by the accused ... if the accused shows his apprehension is reasonable then he has set out a clear case."**

26. The Court further stated that the burden of proof on the part of the accused is on a balance of probabilities. Based on all the foregoing, I am not satisfied that any of the incidents highlighted by the Applicant whether viewed separately or together could have given rise to a reasonable apprehension of bias in the mind of a reasonable, fair-minded and well-informed person. Thus, in my opinion, the Applicant has not brought his case within the provisions of Section 81 of the Criminal Procedure Code and I decline the prayer for the transfer of his case to another court.

27. The court also notes that it is now two years since this court gave directions for the speedy hearing of the case. The direction ought to be complied with so that the matter is determined with dispatch, especially because the Applicant's Co-accused have been caught up by the delays not of their own making. In the result, the application is dismissed. The Applicant is to be produced before the trial court for necessary directions as to further hearing on 16th April 2019.

WRITTEN AND SIGNED AT KIAMBU ON THIS 9TH DAY OF APRIL 2019.

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C. MEOLI

JUDGE

In the Presence of:-

Miss Ndombi – DPP

Applicant in person

Court clerk - Kevin