



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI**

**CRIMINAL CASE NO. 46 OF 2018**

**LESIIIT, J**

**REPUBLIC.....PROSECUTOR**

**V E R S U S**

**ZACHARIA OKOTH OBADO..... 1<sup>ST</sup> ACCUSED**

**MICHAEL JUMA OYAMO.....2<sup>ND</sup> ACCUSED**

**CASPAL OJWANG OBIERO..... 3<sup>RD</sup> ACCUSED**

**RULING ON RECUSAL**

1. From the very first day that the case (**HCCR 42 of 2018**) against the 1<sup>st</sup> applicant came before the court, the counsel for the 2<sup>nd</sup> accused in the case, who is the 1<sup>st</sup> applicant in this application, gave notice that he would be applying to the court to recuse itself from the case.
2. It is on record in that file that on 26<sup>th</sup> September 2018, when the case against the 1<sup>st</sup> applicant was brought to court for plea taking, the defence counsel on record Mr. Amolo, intimated to court that he was under instructions from his client to ask this court to recuse itself. The learned Prosecution Counsel then, Mr. Ondari responded by stating that it was too early for such an application to be considered. Mr. Amollo then promised to put in a formal application in due course.
3. That application was filed after the case against the applicants, the 2<sup>nd</sup> and 3<sup>rd</sup> accused herein, was consolidated with that of the 1<sup>st</sup> accused in this case; and also, after the bail application was filed, heard and the ruling delivered.
4. The 2<sup>nd</sup> accused (hereinafter referred to as the 1<sup>st</sup> applicant) and 3<sup>rd</sup> accused (hereinafter the 2<sup>nd</sup> applicant) by Notices of Motion dated 25<sup>th</sup> April 2019, and 29<sup>th</sup> April 2019 respectively, seek orders which are similar that:

**“3) The Honourable Lady Justice Lesiit J, recuse herself from further conduct of this matter.**

**4) That consequent upon such recusal such direction as to reallocation of the matter to a different judge for hearing and determination be issued to ensure fair and expeditious disposal of the matter.”**

5. The two motions are based upon the following grounds which cut across both applications:

**“I. In light of the position taken by the Honourable Lady Justice Lesiit, J in the hearing and determination of the application for bail pending trial in this matter against the (accused), the (accused) person has reasonable apprehension that there is an appearance of bias by the learned Judge against him which appearance has and continues to defeat a manifestation of justice against the accused person.**

**II. It is trite principal of law that justice must not only be done but must also manifestly be seen to be done.**

**III. It is just and equitable, in the circumstances of this case that the Honourable Lady Justice Lesiit J recuses herself from further conduct of this matter in order to give a manifestation of justice a chance of this matter.”**

6. The two applications are supported by the respective applicant’s supporting affidavits dated 25<sup>th</sup> April, 2019 and 29<sup>th</sup> April, 2019 respectively. The gist of the averments made are that this court, when delivering a bail ruling on 24<sup>th</sup> October 2018, made a contentious

finding that the evidence against the 1<sup>st</sup> applicant and 2<sup>nd</sup> applicant had been acknowledged by the two. Further that this court went against a principle it had established in the said bail ruling that reference to circumstantial evidence was premised on conjecture and that it was dangerous to use such as a ground to deny bail. They contend that the court made prejudicial remarks that negated the presumption of innocence provided for under **Article 50(2) (a)** of the **Constitution**.

7. Mr. Amolo, counsel representing the 1<sup>st</sup> applicant, argued the application on behalf of his client. He urged that the 1<sup>st</sup> applicant's application was based on certain conclusions reached by the court in the bail ruling. He stated that the fact this court made a finding that the 1<sup>st</sup> applicant had acknowledged evidence against him without any evidence having been tendered, it gives him a reasonable apprehension that this court is biased. Counsel submitted that the conclusion made by this court was not based on evidence, nor on any assertion by prosecution, therefore causing the 1<sup>st</sup> applicant reasonable apprehension that he is unlikely to get a fair trial from this court.

8. Mr. Amollo submitted that when the 1<sup>st</sup> applicant pleaded to the charges, the court asked him **?Are you sure about it?**. Counsel urged that the court cannot interrogate a suspect on the day of his plea but is only obliged to record the nature of plea without any further ado. To pause here briefly, I am very sure that the court did not ask the 1<sup>st</sup> applicant such a question during plea and the record bears me right.

9. Counsel finally submitted that under the new constitutional dispensation Kenyans enjoy, the 1<sup>st</sup> applicant is entitled to approach the court and make his fears clear. Counsel placed reliance on the case of **Kaplana H. Rawal vs. Judicial Service Commission & 2 others (2016)eKLR**, to buttress his submissions and urged court to allow the application as prayed.

10. Ms. Angawa counsel representing the 2<sup>nd</sup> applicant argued her client's application on his behalf. Counsel urged that the application was brought under **Articles 25(c)** and **50(1)** of the **Constitution**.

11. Counsel submitted that the 2<sup>nd</sup> applicant has an apprehension that there is apparent bias on the court which has been in existence and continues to defeat justice against him. She urged that the apprehension of bias is attributable to the decision reached by this court while determining the 2<sup>nd</sup> applicant's bail application.

12. Counsel urged that in the ruling delivered on 24<sup>th</sup> October 2018, at paragraph 60 & 62 the court had made the following disturbing findings that:

**I. The evidence against the 2<sup>nd</sup> & 3<sup>rd</sup> accused persons had been acknowledged by both of them. This was despite the clear and un-ambiguous submission by counsel at page 25 of the court record and para C of page 5 of the submission. That nothing in the committal bundle drew a nexus between 2<sup>nd</sup> applicant to the offence charged.**

**II. That the 2<sup>nd</sup> applicant believes that when the court applied different standards between 1<sup>st</sup> accused and himself when considering bail applications, the court acted discriminatory. (sic)**

13. Ms. Mwaniki Learned Prosecution Counsel opposed the application and submitted that the 1<sup>st</sup> and 2<sup>nd</sup> applicants are jointly charged with their co-accused with the same offences and therefore their case cannot be separated since witnesses and the evidence the prosecution intends to rely on is the same. She urged that it would be in the interests of justice for the cases against the three accused in this case to be heard together.

14. Ms. Mwaniki submitted that when the accused persons took plea before this court, they submitted themselves before this court, together with their counsels who have been present at all material time and no objection was raised. She therefore urged that the application was an afterthought.

15. Counsel submitted that the right to bond under **Article 49** of the **Constitution** is not absolute. Courts have the discretion to grant bail or deny the same. She urged that under the **Bail and Bond Policy Guidelines**, one of the issues the court has to consider in a bail application is whether the prosecution's case is strong, which the court considered.

16. This court has been asked to recuse itself on the grounds that the 1<sup>st</sup> and 2<sup>nd</sup> applicants are apprehensive of bias on the part of this court. The basis of contending that the court was biased is two paragraphs in the court's ruling on the bail application by the two applicants and their co-accused, dated 24<sup>th</sup> October, 2018. No other ground is advanced.

17. In regard to bias, the test of likelihood of bias was discussed in **Rep. v Mwalulu & 8 others (2005) eKLR** where the Judges affirmed the principles set out in **Kimani vs Kimani ( 1995-1998) 1 EA 134**, and stated that:

**"....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 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, that the judge is biased or is likely to be biased"**

18. The East Africa Court of Justice in **Attorney General of Kenya vs. Prof Anyang' Nyong'o & 10 Others EACJ Application No. 5 of 2007** adopted the test laid in **Magill v. Porter (2002) 2 AC 357**, and stated:

**"We think that 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 mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say, a litigant who seeks 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.”

19. As stated earlier, the applicants base their apprehension of bias mainly on two paragraphs in the impugned bail ruling. These paragraphs are 60 and 62. In light of the pronouncements made by this court in these two paragraphs, the 1<sup>st</sup> and 2<sup>nd</sup> applicants contend that their right to fair trial and access to justice will not be attained.

20. In the two paragraphs, the court stated:

**“60. The Investigating Officer has shown the kind of evidence he has against the Accused persons. At this stage the court has no duty to make any conclusive findings as to the weight of it. The strength of the prosecution case is a primary factor to guide the court in making its decision on bail. In this case the evidence affecting the 2<sup>nd</sup> and 3<sup>rd</sup> accused has been acknowledged by both of them. They each went further and made responses in their affidavits. It is therefore acknowledged that such evidence exists and cannot be brushed aside...”**

**62. I find that there are compelling reasons not to grant the 2<sup>nd</sup> and 3<sup>rd</sup> accused bail at this stage. I find releasing them may send fear, anxiety to potential witnesses and therefore lead to intimidation of which may adversely affect the case. The likelihood of these Accused absconding cannot be under rated. I also find that their release is likely to disturb public order, peace and therefore public security especially bearing in mind the reaction of the public at the time of their arrest and investigations into this case.”**

21. It is evident from a reading of paragraph 60, that this court based its analysis on the evidence contained in the affidavit sworn by the investigating officer of this case, and on a consideration of the replying affidavits by the 1<sup>st</sup> and 2<sup>nd</sup> applicants.

22. From the submissions of both counsels, the contentious sentence in paragraph 60 appears to be where the court observed, and I quote:

**60.” The Investigating Officer has shown the kind of evidence he has against the Accused persons... In this case the evidence affecting the 2<sup>nd</sup> and 3<sup>rd</sup> accused has been acknowledged by both of them. They each went further and made responses in their affidavits. It is therefore acknowledged that such evidence exists and cannot be brushed aside.”**

23. What the court was discussing in this paragraph was the conclusion arrived at after considering, *inter alia*, the affidavit filed by the investigating officer to demonstrate the kind of evidence the police had against each of the accused persons in the case, and the applicants’ responses. Thus, the reference to ‘**The Investigating Officer has shown the kind of evidence he has...**’ was to the affidavit sworn by the investigating officer in opposition to the bail applications filed by the accused in this case. In that context the court observed that the applicants had each acknowledged the specific averments implicating each of them and had gone ahead to respond to the same. The detailed considerations of the allegations and the responses are discussed in the body of the ruling.

24. By “acknowledgment” the court was not saying that the applicants admitted the allegations, or confessed to the offences based on the allegations in the Investigating Officers affidavit. That is a misconception of the ruling of the court, and is taken completely out of context.

25. To demonstrate the acknowledgment referred to by the court, the 1<sup>st</sup> applicant, in his replying affidavit at paragraph 3 averred:

**“3...I strongly contest the deposition in paragraph 5 of the affidavit by the investigating officer which is specific and states that:**

**“...the deceased Sharon Belyne Otieno was lured by the accused Michael Juma Oyamo on 3<sup>rd</sup> September,2018 from her parents home in Homa Bay County to Rongo in Migori County from where the deceased and Barrack were handled over by the accused to the Killers.”**

26. At paragraph 5 the 1<sup>st</sup> applicant continues to depose:

**“5. It is clear from the content in the statement of Barrack Oduor that there is no assertion nor evidence that I lured Sharon Belyne Otieno as deposed by the Investigating Officer and the deposition that I lured the deceased is a figment of his imagination.”**

27. The 2<sup>nd</sup> applicant on the other hand, at paragraph 9 of his replying affidavit averred:

**“9. THAT besides the allegation that the vehicle allegedly used belongs to my wife, nothing has been adduced in an attempt to create a nexus between myself, the alleged offence and the said motor vehicle.”**

28. The responses by the applicants to the investigating officer’s averments was an acknowledgment that an allegation implicating them to the offence had been deposed in the Investigating Officer’s affidavit; and that it was expedient for them to reply to those allegations. That is what the court was referring to as **“They each went further and made responses in their affidavits. It is therefore acknowledged that such evidence exists and cannot be brushed aside.”**

29. The court’s observations in paragraph 60 were concluding remarks, and were made after the analysis contained in the preceding

paragraphs of the ruling made in the context of the bail application, the averments in affidavits sworn for and against the application, submissions by counsels on both sides, the factors the court had to take into account and the standard of proof applicable. The conclusion the court made, that there was compelling reason to deny bail, was confined within bail consideration, and based on the standard of proof of 'on a balance of probabilities'. It is clear in my mind that this court never made any conclusive determination on any evidence yet to be adduced in the case. The conclusions arrived at apply only to the bail application.

30. There was clearly a misapprehension and misconstruction of paragraph 60 of the impugned court's ruling. There was also a misunderstanding of the ingress of the court's conclusions in a bail application to the trial. As stated, the finding and conclusions arrived at in a bail consideration is based on a standard of proof of 'on a balance of probabilities', and is confined to the bail consideration. Needless to say, the standard of proof required of the prosecution in a criminal trial is proof beyond any reasonable doubt. There is no way the findings of the court in a bail application can have any application to the evidence later adduced in support of the offence and the prosecution case.

31. It is very clear that the applicants labored on an incorrect interpretation of facts, and used that misinterpretation to support their application for recusal of the court.

32. Getting to the applications; The applicants have premised their applications on the ground that **"In light of the position taken by the Honourable Lady Justice Lesiit, J in the hearing and determination of the application for bail pending trial in this matter against the (accused), the (accused) person has reasonable apprehension that there is an appearance of bias by the learned Judge against him which appearance has and continues to defeat a manifestation of justice against the accused person."**

33. The applicants contend that the court is biased against them. The law of evidence is clear that he who alleges a fact has the burden to prove that the fact exists. The burden is on the applicants to prove bias.

34. In the Bangalore Principles bias or prejudice has been defined as a leaning, inclination, bend or predisposition towards one side or another or a particular result. Bias is a condition or state of mind, an attitude or point of view which sways or colours judgment and renders a judge unable to exercise his or her functions impartially in a particular case.

35. In Rep. Vs Hon. Jackson Mwalulu & others Civil Application No. 310/2004, (UR) the Court of Appeal held:

**"That being the position as I see it when the courts in this country are faced with such proceedings (i.e. proceedings for the disqualification of the 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 unfairness of the administration of justice. The test is objective and the facts constituting bias must be specifically established..."**

36. The issue is whether the applicants have established bias. I have laid bear the grounds upon which the applicants based their claim of bias, which are certain wordings and conclusions the court made in the impugned ruling. Having listened to their line of contention, it was very clear to me that the applicants misinterpreted paragraph 60 of the impugned ruling, as I have sought to illustrate herein above. The truth of the matter is that the whole application is based on the misconstrued interpretation of that paragraph. It is my finding that bias has not been established at all in this application.

37. As I stated at the beginning of this ruling, Mr. Amollo for the 1<sup>st</sup> applicant notified the court, on the first day he set foot to this court and entered appearance for his client, at the inception of the case against his client, that he had instructions to ask the court to recuse itself from the case. Plea had not been taken. The application for bail had not been argued. Naturally, the 1<sup>st</sup> applicant was reasonably expected to raise the basis upon which he intended to ask the court to recuse itself from the case before the plea process, before consolidation of the cases herein had commenced, and definitely before the applications on which the impugned ruling was based had been argued. No such ground was argued.

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

**"Recusal, as a general principle, has been much practiced 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*, 8<sup>th</sup> 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." (Emphasis mine)**

39. There has been no allegation that this court has a conflict of interest which may compromise the justice of the case in this matter. The issue then is whether, from what the applicants have presented before court and in their submissions in support of the application, the court can envisage that a reasonable member of the public who is fair minded and informed about all the circumstances of the case, would find that there arises a reasonable apprehension that the judge will not apply her mind to the case impartially. I find that no such perception can arise from the circumstances and the facts of this case. Especially because the basis leading to the conclusion that the court was likely to be or was biased was clearly on a misinterpretation of the impugned paragraphs of the ruling.

40. Even if I applied the test of whether, from what has been presented before the court, the non-participation of the judicial officer is called for, I find that there is nothing to support such a finding that there is cause to believe that the judge should not participate in this case.

41. I have said enough. I have come to the conclusion that the applicants have not presented anything to prove bias against them on the part of the court. They have not presented any facts upon which a reasonable member of public who is fair minded would find that the facts give rise to a reasonable apprehension that the judge will not apply her mind to the case impartially.

42. The upshot of this analysis is that I find that the 1<sup>st</sup> and 2<sup>nd</sup> applicant's application seeking the recusal of this court on apprehension of bias fails to meet the objective and reasonable test of the right-minded person. In the result, the application is dismissed.

**DATED AT NAIROBI THIS 19<sup>TH</sup> DAY OF JULY, 2019.**

**LESIT, J.**

**JUDGE**