



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**H.C.CRIMINAL MISC NO. 26 OF 2018**

**PATRICK EKOMBE ALIAS YORIYORI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

The applicant herein is the accused in Mumias court criminal case No.777 of 2017. He has filed before this court a notice of motion dated 23<sup>rd</sup> April 2018 seeking for orders that

The orders made on 15/2/2018 and 18/4/2018 (before the trial magistrate in Mumias Criminal case No. 777 of 2017) be set aside and/or varied as the applicant has no faith in the trial court.

The grounds in support of the application are that the trial court in Mumias Criminal case No. 777 of 2017 is biased against the applicant and that the court has infringed on the applicant's right of a fair trial.

**Background to the application**

The court record indicates that the applicant had earlier been charged in Mumias criminal case No.569 of 2017. He however absconded and the case was withdrawn under section 87(a) of the criminal procedure code. He was later arrested and charged with the same offence in Mumias criminal case No.777 of 2017. When he appeared for plea on 23/8/2017 he alleged that the proceedings in criminal case No.569 of 2017 had been terminated. The trial court checked the proceedings in criminal case No.569 of 2017 and found that the case had indeed been withdrawn under section 87(a) of the CPC after the applicant had absconded which meant that he could be re-arrested and charged with the same offence. When the consequences of the withdrawal of the case under section 87(a) of the CPC were explained to the applicant he retorted that he had no confidence in the trial court handling the matter and sought for the case to be transferred to the chief magistrate's court, Kakamega.

The trial court declined to accede to the request. The court proceeded to hear the case. The prosecution called 4 witnesses. It closed its case on the 15/2/2018. The court then considered the evidence that had been placed before it and made a ruling that the applicant had a case to answer and thereupon placed him on his defence.

Upon being placed on his defence the applicant said that he opted to give unsworn statement and call 2 witnesses. He requested to be supplied with copies of proceedings to enable him prepare for his defence. The court acceded to the applicant's request. The case was adjourned to 19/4/2018. When the case came up for defence hearing on that day, the applicant said that he had gone through the proceedings and had found that the record did not capture some of the questions he had put to the prosecution witnesses during cross examination. He said that he had no confidence in the trial court. He sought that the case be transferred to another court. The prosecution opposed the application on the grounds that the application was being employed as a delaying tactic to the finalization of the case. The applicant then moved to this court and made the application dated 23.4.2018.

**Determination**

The applicant sought for the trial magistrate to recuse herself from the case on the grounds that the magistrate was biased against him. The test on the question of bias against a judicial officer was stated by the Court of Appeal in *Philip K. Tunoi & Another Vs Judicial Service Commission & Another* (2016) eKLR where the court cited the English case of *Porter Vs Magill* (2002) 1ALL ER 465 where the House of Lords 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”.***

The court also cited with approval the decision in *Tumaini Vs Republic* 1972 EALR 441 where it was held 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.

It is clear from the record that the applicant had from the very beginning sought for the trial court to recuse itself from the case purportedly because the charges had been terminated under section 87(a) of the CPC. Section 87(a) of the CPC states as follows:

***In a trial before a subordinate court, a public prosecutor may, with the consent of the court or the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced withdraw from the prosecution of any person and upon withdrawal :-***

***a. if it is made before the accused person is called upon to make his defence, he shall be discharged but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.***

The plain meaning of this section is that a person discharged thereunder may thereafter be arrested and charged with the same offence acquitted of. It was therefore untenable for the applicant to demand that the trial court recuses itself from the case simply because the magistrate insisted on proceeding with the case. The trial magistrate had not contravened any law. The application for the magistrate to disqualify herself from the case on that ground was baseless and mischievous.

The applicant says that the court record does not contain some of the questions that he put to the prosecution witnesses during cross-examination. However he has not given details of any answers that were left out. The application for the magistrate to recuse herself on that ground was also baseless.

The applicant wrote a letter to this court dated 26/7/2018 raising some other issues in relation to the conduct of the case. He argued in court that there was no basis for the trial court placing him to his defence.

I have gone through the evidence adduced in the lower court. There was sufficient evidence to place the applicant to his defence. The court need not go to the merits as the case is still pending. Suffice is to say that the applicant was properly placed to his defence. The trial court is in a position to deal with the other issues raised in the letter dated 26/7/2018 upon application by the applicant.

In the foregoing, the applicant has not shown any aspect of bias by the trial court. Any independent person considering the grounds for recusal as advanced by the applicant in the case would not conclude that there was a real possibility that the trial magistrate was biased against the applicant. The application dated 23/4/2018 has no merits and is dismissed accordingly. I order that Mumias criminal case No.777 of 2017 proceeds to its conclusion before the trial magistrate, T.A. Odera.

Delivered, dated and signed in open court at Kakamega this 19<sup>th</sup> day of September, 2018.

**J. NJAGI.**

**JUDGE.**

In the presence of:-

Appellant ..... appearing in person.

Miss Omenga ..... for the state.

George ..... court Assistant.