



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
REVISION NO. 170 OF 2015
KINYUA MUYAA ADVOCATE.....APPLICANT

RULING

This revision application was commenced by way of a letter dated 22nd October, 2015 and addressed to the Resident Judge by Kinyua Kamundi Advocate.

The grounds of the said application are that a public inquest was opened to inquire to the suspicious death of Harry Roy Veevers on the morning of 14.2.2013 in one of his houses at Shree Links Estate, Nyali Mombasa. The hearing commenced on 5th October, 2015 and on 21st October 2015, when the 2nd witness, Mr Richard John Veevers was being led by Mr. Jami, counsel for the state, he sought to produce an original letter from the Superintendent Registrar of Rochdale Borough Council Greater Manchester, UK to the effect that the deceased was not married to the woman he was with at his death. The advocate for Miss Hellen Veers, Miss Alexandra Veevers and Ms Azra Parvin Din objected to this while questioning the impartiality of the magistrate and said that he had photographs and other evidence the effect that one of the witnesses/complainant had somehow prevailed upon the court clerk of that court to threaten or harass Miss Hellen Veevers. The said advocate is also alleged to have said that there were photographs and call logs showing the inappropriate contact between the court clerk and one of two of the witnesses. That this advocate then claimed that he was apprehensive that the process will not be fair and just.

The applicant's, counsel then requested for evidence with regard to these allegations but it was not availed to the magistrate. However, in considering the objection, the honorable magistrate recused herself and ordered the file to be forwarded to the Chief Magistrate, Mombasa for mention on 26th October, 2015, for further orders.

The argument by the applicant are that, by recusing herself from hearing the said inquest; the trial magistrate.

- a. Erred as the accusations were made against court clerk.
- b. Erred by failing to find out what evidence the said advocate had to establish the inappropriate behavior or contact between the clerk and any witness.
- c. Erred by making a decision based on statement made from the bar and denied the affidavits applicants client to execute whatever evidence the other side had.
- d. Erred as she had not been asked to do so.

It was the applicant's request that the court also orders that:

- a. thorough investigations into the said allegations/claims be conducted and those found culpable arrested and charged with appropriate offences under the Penal code.
- b. to avoid delay in hearing and determination of the inquest in question, declaration be given that it proceeds simultaneously with the said investigations.

The High court is clothed with powers of revision as provided in Section 362 of the Criminal Procedure Code in the following manner:

“ The High court may call for and examine the record of the criminal proceedings before any subordinate court for the purpose of satisfying itself as to the corrections, legality or propriety of any finding, sentence, or order recorded in respect and as to the legality of any proceedings of any such subordinate court”.

I have perused the record of proceedings and seen that the trial magistrate was presented by an objection to the production of a letter received by Pw2, Mr. Richard John Veevers in the course of his evidence, and it contained serious allegations against the court clerk by Mr. Mogaka, advocate.

The main reason for seeking a revision in this case by the applicant counsel is a letter the trial magistrate was justified in recusing herself from the matter, in view of the allegations made against her court clerk.

Bearing in mind the material presented before the trial magistrate, I find it was not justifiable for her to recuse herself from the matter.

As indicated in their letter, the applicant stated that the allegations were against a court clerk who is not seized with the power to write, sign or deliver the decision Of the inquest.

It is worth noting that the trial magistrate in her ruling after the said objection, properly noted the law with regard to the conduct of inquiries/inquest as set out under Section 136 to 138, all of the criminal Procedure Code, as her guidelines. She went on to recuse herself from the matter while acknowledging that ***“the nature of such evidence is still unknown to the court”.***

In the Bangalore Principles of Judicial conduct, Article 52:

“ Impartiality is the fundamental quality required of a judge and the one attribute of the judiciary. Impartiality must exist both as a matter of fact and as a matter of reasonable perception. If partiality is reasonably perceived, that perception is likely to have a sense of grievance and of injustice, thereby destroying confidence in the judicial system. The perception of impartiality is measured by the standard of a reasonable observer. The perception that a judge is not impartial may arise in a number of ways, for instance through a perceived conflict of interest, the judge's behaviour on the bench, or his or her association and activities outside the court”.

The expectations of litigants are normally high. But it is upon a judge or magistrate to ensure or confirm that the grounds for such perception are reasonable to avoid forum shopping by some of the litigants.

The allegations that were made were against the court clerk and not the trial magistrate. There was therefore need for the trial magistrate to order investigations into the said allegations where the evidence that was alleged to exist would be produced.

The recusal was uncalled for, especially since a magistrate undertakes to perform his or her duties without fear, favour, bias or prejudice. In fact, such action by the trial magistrate would easily be perceived to indicate that she was aware of her clerk's conduct, which may not have been the case.

The trial magistrate's action of recusing herself from the matter and referring it to the Chief Magistrate, Mombasa for directions. Offends the provisions of Article 50 (1) of the Constitution which provides for fair hearing. Fair hearing encompasses expeditious hearing.

Such recusal is also a burden upon colleagues in view of the hearing back log of cases the judiciary carries.

I find the decision by the trial magistrate to recuse herself lacking propriety. However, in view of events that followed this decision, I uphold her decision of referring the matter to the Chief Magistrate, Mombasa law courts for reallocation before another magistrate of competent jurisdiction for hearing and determination.

I also direct that the investigations into the claims or allegations made by Mr. Mogaka, Advocate on 21st October 2015, be conducted and anyone found culpable in either way, be charged with appropriate offences under the Penal Code. The office of the Director of Public Prosecution to extract this order. For action further I direct that the said investigations to proceed concurrently with the hearing of the said inquest.

Ruling signed, dated and delivered this 1st day of April 2016.

D. Chepkwony

Judge

In the presence of:

Mr Muthuri holding brief for Kinyua

Mr Anyuka for the state

C/clerk- Kiarie