



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**MISC. CRIMINAL APPLICATION NO 48 OF 2016**

**FELIX MWOVA VAASYA**

**VERSUS**

**REPUBLIC**

**R U L I N G**

**INTRODUCTION**

0. The applicant who is charged with the offence of defilement before Tawa SRM Court Criminal Case No. 23 of 2016 has filed a Notice of Motion dated 11<sup>th</sup> April 2016 seeking order as follows:
- a. **That this application be certified urgent and that he be heard exparte in the first instance**
  - b. **That this Honourable Court be pleased to stay the continuation of proceedings in Tawa SRM Criminal Case No. 23 of 2016 Republic v. Felix Mwova Vaasya pending the hearing [and] determination of this application.**
  - c. **That this Honourable Court be pleased to order the disqualification of Hon. M.M. Nafula SRM in Tawa Criminal Case NO. 23 of 2016 Republic vs. Felix Mwova Vaasya and a subsequent transfer of the said case to any other magistrate in Tawa Law Court for hearing.**
  - d. That costs of the application be in the Cause.
0. The grounds of the application were set out in the application being primarily that the applicant had a reasonable misapprehension that he will not get a fair trial in accordance with the constitution if his trial continued before the trial court; that the trial court had shown open bias against the applicant; and that the trial magistrate had on application by the applicant's counsel declined to disqualify herself.
0. The applicant urged that he had reasonable apprehension of bias of the trial court based on the fact that the court had directed that the trial commenced on the following day after plea was taken and without being afforded an opportunity to obtain representation by an advocate and when he eventually secured counsel a date for hearing was given which was inconvenient to the said counsel. The substance of his complaints were set out paragraphs 2-10 of his affidavit as follows:
2. *That I was arrested and arraigned in court on 8-2-2016 on allegation of defilement in Tawa SRMC Court Criminal Case No. 23 of 2016 (annexed and marked FMV 1 is a copy of the charge sheet).*
  3. *That upon taking plea before Hon. M.M. Nafula SRM listed the matter for hearing on 9-2-2016 a day after and this was despite that I needed time to conduct my relatives and legal representation and an adequate time and facility to prepare for the trial.*

4. *That I remained in custody and on 9-2-2016 the following day I was arraigned in court and I was ordered to proceed with the trial despite raising concerns that I had not received the witnesses statement, charge sheet and I had not engaged an advocate to represent me and the learned magistrate failed to put down my pleas and the trial proceeded without complying with pre-trial procedures and the learned magistrate openly shown bias on me since she refused to hear my pleas (annexed and marked FMV 2 is a copy of the proceedings).*
5. *That two witnesses testified on 9-2-2016 and later in the day I managed to trace my relatives who paid cash bail and I was released although the court directed the matter for further hearing on 1-3-2016.*
6. *That I engaged my present advocate to defend to defend me although the date that was given for 1-3-2016 was not convenient to them on 1-3-2016 a counsel by the name Mr. Makau held my advocate and sought adjournment since my advocate was held up in Miriakani court, the court reluctantly allowed the adjournment however directed that the date suggested would not go beyond 15-3-2016, counsel holding brief indicated my advocate had no date available and the learned magistrate refused a date further than 15-3-2016 forcing my advocate to accept the 15-3-2016 which was not convenient, although the magistrate indicated hearing at 11 am, this clearly demonstrated an open bias on my side.*
7. *That the upshot of the foregoing is that my rights under the constitution under article 50 were violated making the trial unfair, I should have been accorded adequate time and facility to prepare for my defence including having to engage an advocate.*
8. *That the learned magistrate did not indicate why the trial should be done in such a hurry yet the complainant is a Kenyan and not a freight risk is a resident of Tawa and all other witnesses the constitution is paramount and justice should be seen done.*
9. *That the denial of the trial magistrate for an access of advocate and get the witnesses statement before the trial began has led to a miscarriage of justice since two witnesses testified and has failed to indicated my objection on record hence the trial is unfair.*
10. *That my advocate on record applied for disqualification of the learned magistrate and she declined to disqualify herself saying that the trial proceeded a day after plea since the complainant was joining form 1 which was out of contest and failed to appreciate my rights under the constitution had been violated.*
0. In reply, Prosecution Counsel, Mr. Machogu, swore a replying affidavit of 26<sup>th</sup> April 2016, opposing the application in the following terms:
  - “2. *That the advocate had filed an application similar to this one before the trial court which was dismissed and the applicant was granted fourteen days to appeal if he was not satisfied with the trial court’s ruling.*
  3. *That the grounds for disqualification raised herein are an afterthought since they are different from those that had been raised before the trial court.*
  4. *That on 09/02/2016 that applicant indicated that he was ready to proceed with the hearing of the case without raising an issue that he had not been supplied with witness statement.*
  5. *That the Constitution, the Criminal procedure Code and the Evidence Act provide sufficient safeguards to ensure that the applicant gets a fair trial.”*
0. Counsel for the parties – Mr. Kamolo for the Applicant and Mrs. Abuga for the DPP – made oral submissions on prayer (c) of the Notice of Motion when the application came up for hearing on 29<sup>th</sup> April 2016 and ruling was reserved for the 6<sup>th</sup> May 2016. For the applicant, Counsel

submitted that the facts of the case demonstrated a reasonable apprehension of bias on the part of the trial court to warrant disqualification while the DPP urged that the applicant ought to have appealed the trial court's refusal to recuse and in any event no bias had been demonstrated and that in any event the applicant's counsel could have applied for recall for cross-examination the witnesses who had testified before the applicant obtained counsel.

### **ISSUE FOR DETERMINATION**

0. In determining the central issue is whether the High Court will order the disqualification of the trial court and transfer of the case to another court, the Court will also consider the question whether the applicant can by a fresh application for disqualification of the magistrate repeat the application which the trial court declined for reasons given in its ruling of 22<sup>nd</sup> March 2016 or whether the matter should come to the High Court by way of appeal. In other words, can the High Court set aside the trial magistrate's decision on recusal by a fresh application in the High Court.

### **DETERMINATION**

#### *The Principles*

0. There is really no appeal from a decision on recusal. The Criminal Procedure Code only contemplates appeals from conviction and sentence, on the one hand and, acquittal and rejection or dismissal of charge, on the other hand, for the Accused and the Prosecution, respectively. Sections 347, 348 and 348 A of the Code provide as follows in relation to appeals:

*“347. (1) Save as is in this Part provided -*

*(a) a person **convicted on a trial** held by a subordinate court of the first or second class may appeal to the High Court; and*

*(b) (Repealed by 5 of 2003, s. 93.)*

*(2) An appeal to the High Court may be on a matter of fact as well as on a matter of law.*

*348. No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except **as to the extent or legality of the sentence.***

*348A. When an accused person has been **acquitted on a trial** held by a subordinate court, or where an **order refusing to admit a complaint or formal charge, or an order dismissing a charge**, has been made by a subordinate court, the **Attorney-General may appeal to the High Court from the acquittal or order on a matter of law.**”*

0. An aggrieved party may seek an order to disqualify the trial court under provisions of law which permit the High Court to transfer a case from one subordinate court to another or by virtue of the revisionary powers or supervisory jurisdiction of the High Court over subordinate Court. In this regard, Section 81 of the Criminal Procedure Code provides for transfer of criminal cases between subordinate courts as follows:

*“81. (1) Whenever it is made to appear to the High Court -*

*(a) that a **fair and impartial trial cannot be had in any criminal court subordinate thereto;**  
or*

*(b) that some question of law of unusual difficulty is likely to arise; or*

*(c) that a view of the place in or near which any offence has been committed may be required*

*for the satisfactory trial of the offence; or*

*(d) that an order under this section will tend to the general convenience of the parties or witnesses; or*

*(e) that such an order is expedient for the ends of justice or is required by any provision of this Code, it may order -*

*(i) that an offence be tried by a court not empowered under the preceding sections of this Part but in other respects competent to try the offence;*

*(ii) that a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction;*

*(iii) that an accused person be committed for trial to itself.*

***(2) The High Court may act on the report of the lower court, or on the application of a party interested, or on its own initiative.***

*(3) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Attorney-General, be supported by affidavit.*

*(4) An accused person making any such application shall give to the Attorney-General notice in writing of the application, together with a copy of the grounds on which it is made, and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of notice and the hearing of the application.*

*(5) When an accused person makes any such application, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the costs of the prosecutor.”*

0. In addition, section 364 of the Criminal Procedure Code the High Court is entitled to revise the proceedings and orders of a trial court in certain circumstances as follows:

***“364. (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may -***

*(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;*

***(b) in the case of any other order other than an order of acquittal, alter or reverse the order.***

*(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:*

*Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.*

*(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.*

(4) *Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.*

**(5) *When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.***

0. More importantly, pursuant its constitutional supervisory jurisdiction under Article 165 (6) the High Court has supervisory jurisdiction over subordinate courts as follows:

*“(6) The High Court has **supervisory jurisdiction over the subordinate courts** and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”*

0. As regards transfer of cases, the High Court in ***Muriithi v. Attorney General*** (1986) KLR 1, (Hancox J.) cited Sachdeva, J in ***Karanja v. R*** Misc Cr. Application No. 199 of 1976 and Trevelyan J. in ***Shilenje v. R*** Cr. Application NO. 180 of 1980 for the test of ‘reasonable apprehension’, [meaning, in his view, ‘apprehension on reasonable grounds] developed in ***R v. Hashimu*** (1968) EA 636 that before transfer of trial is granted there must be made out a clear case that the accused has a reasonable apprehension in his mind that he will not have a fair and impartial trial before the magistrate from who he wants the trial transferred.

### ***Constitutional Trial Rights***

0. The accused has constitutional trial rights under Article 50 of the Constitution to adequate time and facilities to prepare for his trial and to be informed of his right to counsel as follows:

*“50 (2) Every accused person has the right to a fair trial, which includes the right—*

*(c) to have **adequate time and facilities** to prepare a defence;*

*(g) to choose, and be represented by, an advocate, **and to be informed of this right promptly;**”*

In addition he has a right under Article 50 (2) (j) to the witness statements and evidence to be used by the Prosecution during the trial as follows:

*“(j) to be **informed in advance of the evidence the prosecution intends to rely on**, and to have reasonable access to that evidence;”*

0. In observing that the version of events which the appellate court must consider as true record of the proceedings of the trial court must be such as is recorded by the trial court, I must exhort trial courts to make as copious notes of the proceedings before them to avoid such complaints of failure to record submissions as made in this case. An accused person has a right to the record of proceedings under Article 50 (5) of the Constitution:

*“50 (5) An accused person—*

*(a) charged with an offence, other than an offence that the court may try by summary procedures, **is entitled during the trial to a copy of the record of the proceedings of the trial on request; and***

*(b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.”*

0. The High Court also relies on the record of the trial court for purposes of appeal, revision, or supervisory jurisdiction. There must, therefore, be a presumption of integrity of the record of the trial court, unless it can be rebutted by strong evidence that the record was incomplete.

## ***Findings of Fact***

0. Allegations of failure to record by an accused cannot be proved by mere statements even on oath in an affidavit or by counsel from the bar. It is a serious matter that the trial court had subverted the trial by selective record of the proceedings which goes to the very core of judicial trial requirement of fair and impartial hearing. When I asked the Counsel for the applicant why he did not swear an affidavit on the matter in view of the seriousness of the allegation, he said that he could not swear an affidavit in view of his position as counsel in the matter.
0. With respect, the question of partiality of a court goes to the root of the judicial proceedings as there can be no valid 'partial' judicial tribunal, and such event that render a court or other tribunal impartial must be exposed by suitable evidence so that the situation is redressed by disqualification of the court or tribunal, and even appropriate disciplinary proceedings for breaching the professional rules of impartiality. An advocate as an officer of the Court would owe a duty to the institution of the Court to expose its members who act otherwise than consistently with the impartiality characteristic of a court or tribunal in accordance with Article 50 (1) of the Constitution which provides:

*“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing **before a court or, if appropriate, another independent and impartial tribunal or body.**”*

0. Having studied the record of proceedings in this matter, I am not persuaded that the trial magistrate was biased, or that there was grounds upon which a reasonable person would consider that the magistrate was biased, or that there was anything in the standard of reasonable apprehension of bias to warrant a disqualification and or transfer of the case to another court. The Court may have, as it said in the ruling on disqualification, been genuinely anxious to expedite the hearing in view of the Children Act requirements in cases involving children and the fact as stated by the Prosecution in response to the application for disqualification that the complainant girl victim was due to join secondary school Form One. No cogent evidence of bias or reasonable apprehension of it was adduced.
0. I agree with the learned trial court that applications for disqualification of the Court go to the core of administration of justice and in its reliance on the holding of Court of Appeal decision in ***Galaxy Co. Ltd. vs. Falcon Guards Ltd*** (1999) eKLR that –

*“Although it is important that justice must be seen to be done it is equally important that judicial officers discharge their duty to sit and do not by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeing the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.”*

See also ***Muriithi v. Attorney General***, supra, and the cases considered therein.

0. However, a valid criticism must be made against the trial court, not on account of bias, in my view, but for the obviously too hurried a manner in which it conducted the trial - regardless of the need for expedition of the matter which involved a child complainant who as it turned out was headed for Form One secondary school admission - leading to total disregard and violation of the accused's constitutional trial rights under Article 50 (2) of the Constitution for adequate time and facilities to prepare for his defence, to be supplied with witness statements and to be represented by Counsel.
0. It counts for nothing as a response to such criticism that the accused had indicated on the day of hearing that he was ready to proceed with the trial. In the interests of fair trial for the accused, the court could only have accepted this indication that the accused was ready to proceed upon confirming that the accused had in accordance with the court's direction obtained copies of the prosecution witness statements and other evidence, as he was entitled to by the Article 50 (2) (j) of the Constitution and after informing the accused of his right counsel as the court was enjoined to do by Article 50 (2) (g), and this enquiry and response should be record as part of the proceedings. An accused person who is unrepresented by counsel, who was arraigned in court

only the day before hearing and who states in court that he is ready to proceed with the trial must raise the eyebrows of the court into caution, as the Court has a duty to give the accused a fair trial in accordance with the Article 50 of the Constitution. The provision, if this happened at all, of prosecution witnesses' statements the previous day before trial cannot be said by any reasonable standards to have afforded the accused person who is unrepresented by advocate with '**adequate time and facilities to prepare a defence**' (Art.50 (2) (c)) and reasonable information and access '**in advance of the evidence the prosecution intends to rely on**' (Article 50 (2) (j) of the Constitution). The proceedings in the trial the day following arraignment of the accused in court in the circumstances of this case infringed upon the accused's right to counsel, to be informed of the evidence of the Prosecution and to adequate time and facility to prepare for his defence, and must be set aside in the interests of justice.

0. While the zeal on the part of the trial court to give the matter an expedited trial in view of the nature of the charge of defilement and the age of the victim is understandable, the Court still had a duty to balance the need for expeditious disposal of the trial and the accused's constitutional right to a fair trial. It was not for the accused, who was unrepresented, to indicate that he was ready to proceed with the trial, and for the trial court to be thereby exonerated of its constitutional duty. No! It was the constitutional duty of the trial Court to inform the accused of his right to the prosecution's evidence in advance of the trial and of his right to counsel. It was not for the accused to ask for the statements or for an opportunity to be represented by legal counsel; it was for the Court to inform him of these rights and to afford him an opportunity to take benefit of these rights.
0. In ordering the commencement of hearing of the serious charge of defilement the very following day after plea is taken by an unrepresented accused person who is to be supplied with prosecution witness statements by order made at the Plea (which is not confirmed to been complied with before trial commenced) and accepting a statement by the unrepresented accused that he was ready to proceed with the case, without informing him of his right to be represented by counsel in accordance with article 50 (2) (g) of the Constitution, the learned trial magistrate acted in contravention of the accused's fair trial rights. The High Court as a Constitutional Court is under a duty to remedy breaches of the constitutional provisions on the trial rights whenever it becomes aware of such violation or threat of violation whether under its Bill of Rights jurisdiction or under the supervisory jurisdiction of the Court.

## **CONCLUSION**

0. The Court does not find that the learned trial magistrate was biased in any way to the standard of 'reasonable apprehension' of bias required in cases of application for disqualification of trial court and or transfer of cases as permitted under section 81 of the Criminal Procedure Code. The Court, however, finds that finds that the order for commencement of trial on the 9<sup>th</sup> February 2016 only a day after plea was taken on 8<sup>th</sup> February 2016 was not such as to afford adequate opportunity to the accused who was not represented by an advocate to prepare for his defence bearing in mind that he was to be given the witness statements the same day following an order therefor by the court. The default by the trial court to inform the accused of his right to be represented by counsel and to give him an opportunity, if so desired, to hire an advocate also violated the express text of the constitutional right to counsel. The High Court in exercise of its supervisory jurisdiction must, in the circumstances, order for the remedying of the situation by affording the accused an opportunity to recall for cross-examination the two prosecution witnesses who testified on the 9<sup>th</sup> February 2016 a day after then unrepresented accused was arraigned in court. The proceedings of the 9<sup>th</sup> February 2016 must, consequently, be set aside.

## **ORDERS**

0. Accordingly, pursuant to its supervisory jurisdiction under Article 165 (6) of the Constitution, this Court may properly give directions for further progression of the trial in a manner as to remedy or correct defects of procedure or violation of accused's trial rights in accordance with the Constitution and relevant law. Accordingly, I direct that the trial of this case proceeds before the same trial court in accordance with the directions of this Court as follows:

1. The proceedings of the trial court of the 9<sup>th</sup> February 2016 are set aside for violating the applicant's right to fair trial;
  2. The Applicant's Counsel will be given copies of witness statements and copies of documentary evidence to be relied upon by the Prosecution at the trial;
  3. The applicant will be given an opportunity to prepare for his defence with assistance of his counsel and there shall be at least fourteen (14) days between the supply of the witness statements and the hearing or commencement of trial;
  4. The trial court shall grant opportunity for the applicant to recall for cross-examination by his counsel of the two Prosecution witnesses PW1 and PW2 who testified before the applicant was represented by legal Counsel.
  5. For clarity, the trial magistrate who commenced the hearing of the trial will proceed to hear and determine the case to its conclusion.
0. The Costs of the application will be paid by the Prosecution to the Applicant.

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF MAY 2016.**

**EDWARD M. MURIITHI**

**JUDGE**

**In the presence of: -**

Mr. Mbullo for Mr. Kamolo for the Accused/Applicant

No appearance for the Republic/Respondent

Ms. Doreen - Court Assistant.