



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 77 OF 2014

REPUBLIC.....PROSECUTOR

VEERSUS

RAPHAEL MUOKI KALUNGU.....ACCUSED

RULING

Background

On 12th May 2015 when this matter came up for hearing, the prosecution counsel Ms Mwaniki was not in court. She had sent Ms Macharia to hold her brief with instructions that she was not available for the hearing on that day because she had three other matters in other courts. She sought to have the hearing commence on 14th May 2015. The application for an adjournment was opposed by Ms Kethi Kilonzo defence counsel who submitted that the hearing dates had been taken in the presence of the prosecution counsel who had indicated her availability. Ms Kethi told the court that the defence was ready for hearing and was willing to wait until the prosecution counsel was available.

This court directed that Ms Mwaniki attends court in person to explain the circumstances she was faced with. The file was kept aside and court adjourned the matter to allow for this. When court resumed at 10.05am it was informed by Ms Macharia that Ms Mwaniki was at that time on her feet prosecuting before Hon. Justice Korir therefore could not attend this court. Faced with this predicament I made a ruling allowing an adjournment to 14th May 2015 and indicated that Ms Mwaniki owed this court an explanation on the manner this matter had been handled.

On 14th May 2015 Ms Mwaniki was in court. In her address to the court she explained about the events of 12th May 2015. Before she concluded her submissions she made an application asking me to recuse myself from handling this case.

The application

Counsel did not seek time to formally file the application for my recusal. The manner in which the application was made was totally unexpected. It caught both the court and the defence by surprise because the court was of the view that Ms Mwaniki was explaining about what happened on 12th May 2015. She started by giving a length explanation why she could not attend the hearing of this case on the 12th May 2015. She said she had three partly-heard cases before Justices Ombija, Lesiit and Korir, all Judges of the Criminal Division; that the cases before Justices Ombija and Lesiit failed to take off due to circumstances beyond her control; that she proceeded with the case before Justice Korir; that she could not attend this court to explain her circumstances because when she came to this court she found the court had adjourned to resume at 10.00am; that at that time she was on her feet prosecuting before Hon. Justice Korir and

being the only prosecution counsel in that court she could not leave. Ms Mwaniki submitted further that the defence had been allowed an adjournment from 11th May 2015 to 12th and 14th May 2015 and that this was the first time the matter was coming for hearing.

Then Ms Mwaniki then told the court as follows:

“On 12th May 2015 it was unfortunate the court made some harsh remarks on me and the Office of the DPP. I do not have a permanent court and I have matters in this court. This was the first time the matter was coming for hearing. The circumstances were beyond my control. Justice must be seen to be done and with total respect I feel that the court was biased and I pray that this court does recuse itself from hearing this matter and place the matter before another Judge for hearing. The witnesses were in court and are uncomfortable because justice must be seen to have been done. I ask the court to recuse itself (sic).”

Mr. Karigi, holding watching brief for the family of the deceased, addressed this court as well. He told the court that he had been instructed by the family to ask me to recuse myself. He submitted that the family of the deceased who are the witnesses in this case were in court on 12th May 2015 when this court made “derogatory” comments against the prosecutor and the DPP; that the family feel that this court should not continue hearing this case because they feel that this court is not impartial. Mr. Karigi went on to submit that the court did not object when the defence sought an adjournment from 11th May 2015. He said that justice is rooted on confidence and this is eroded when right minded people walk out of the court thinking the court is biased.

Ms Kethi in reply told the court that it was unfortunate that the application for recusal was made in this manner. She submitted that the prosecution made an application for adjournment on 12th May 2015 and the defence opposed it necessitating the court to make a ruling. She stated that she was in court and did not hear the court making any unsavory or derogatory remarks in the ruling on adjournment. She said that both Ms Mwaniki and Mr. Karigi were not in court on 12th May 2015 and therefore they were giving evidence from the bar. Ms Kethi submitted that since both counsels were not in court they ought to file a formal application with supporting affidavits from witnesses who said they heard the unsavory or derogatory words.

Before determining this application, I wish to comment on the issue raised by defence counsel that the prosecution counsel ought to have filed a formal application with supporting affidavits. Indeed this is the best way to have made the application for my recusal. It was not done and prosecution counsel seemed very emotional when addressing the court. She did not ask for time to file a formal application nor did she hint to the court that she needed to do so. In fact the manner she approached the court was rather unusual. The application for recusal was made during her concluding submissions after which she asked Mr. Karigi to address the court on the same issue on behalf of the witnesses.

This is water under the bridge now. Since defence counsel responded, this court will not turn its back on a matter of importance like this one. I fully understand the application and the response by the defence counsel. I will therefore not lay too much emphasis on procedural technicalities although in my view it would have served the prosecution counsel better had she filed a formal application with all the facts she could gather in support of her application. I will proceed and give my ruling on the matters raised before me.

Application for recusal of a judge is the occupational hazard every judge must face in the course of her/his judicial career. Any judge will tell you that listening to an application for judge’s recusal and making a ruling on that application are some of the biggest challenges judges face in the course of their judicial duties. The judge is the subject of the recusal proceedings and yet he/she is expected to rise above the proceedings and determine the matter rationally. The stamina to do this is drawn from the judicial oath a judge takes before sitting as a judge. A judge in Kenya swears to impartially do justice in accordance with the Constitution, the laws and customs of the Republic, without any fear, favour, bias, affection, ill will, prejudice or any political, religious or other influence. The effect of this oath raises the

judge above being just a mere human being to a higher calling. This calling is something greater than a judge's personal feelings of any judge. Judges need this if they are to serve in their capacities as administrators of justice.

General Principles

The fundamental principle as observed by the House of Lords in **R. v Bow Street Metropolitan Stipendiary Magistrate and Others ex parte Pinochet Ugarte (No. 2) [1999] 1 All E R**, is that a man may not be a judge in his own cause. Courts have developed this principle further into two applications. The first one is where a judge has an interest in the matter before the court either as a party or as having financial or proprietary interest in the outcome of the case. The second application is where the judge conducts himself or herself or behaves in a manner that may give suspicion that he/she is not impartial (see **EACJ Application No. 5 of 2007 Attorney General of the Republic of Kenya and Prof. Anyang' Nyong'o & 10 Others**)

In these proceedings I stand accused of bias and impartiality. Both the prosecution counsel and counsel for the family of the deceased accuse me of uttering some words, either harsh, unsavory or derogatory, towards the prosecution counsel and the office of the DPP that portray me as biased against that office and by extension against the witnesses who happen to be the family of the deceased. These words are said to have been uttered in the presence of these witnesses making them uncomfortable for me to continue handling this matter. What are these words? I think it makes sense to reproduce what transpired on 12th May 2015. Ms Macharia sought an adjournment on behalf of Ms Mwaniki after which this court made a ruling following the objection by the defence counsel. Ms Macharia told the court this:

“Ms Mwaniki is seeking an adjournment. She has three more hearings today: Cr. Case No. 49 of 2010 before Justice Ombija; Cr. Case No. 36 of 2010 before Justice Lesiit and Cr. Case No. 40 of 2012 before Justice Korir. This matter was given two days. She requests we start the case on Thursday 14th May 2015. It is a 2014 matter and there are two witnesses.”

The court placed the file aside and told Ms Macharia to inform Ms Mwaniki to appear before the court in person and explain her circumstances. Ms Mwaniki did not come. This court made a ruling in respect of the application for adjournment in the following terms:

“I have considered the application for an adjournment and the opposition. First I wish to take exception in the manner Ms Mwaniki the prosecution counsel in conduct of this case is conducting herself. While this court appreciates that counsel has other matters before sister/brother judges it is my view that she ought to manage her diary efficiently. It will not do to say this case is young and therefore should be adjourned. Ms Mwaniki still owes this court an explanation as to how she came to be in the situation she is in now. As far as this court is concerned it matters not whether the case is young or old. The hearing dates were taken after consultations and everyone confirmed dates were convenient. I wish to caution prosecution counsel that this is not the way to go given that she is an officer of this court and needs to facilitate it. Adjournment is granted. Hearing on 14th May 2015.”

It is true both Ms Mwaniki and Mr. Karigi were not in court on 12th May 2015. This court was told that two witnesses were in court. They were not identified to the court and as far as this court's records are concerned there is no indication of who these two witnesses were. Despite this, both counsels stated that they were informed about the utterances of this court. As I stated elsewhere in this ruling, prosecution counsel did not make a formal application to enable canvassing of the facts and no affidavits have been filed to that effect. Third parties gave information to Ms Mwaniki and Mr. Karigi about the harsh or derogatory utterances of this court! This court is not able to know what Ms Mwaniki was told and by who.

Asking a judge to recuse herself is a serious matter. One who comes to court to ask the presiding judge in a case to recuse herself must come fully and properly armed with all the necessary material to support such an application. This is so because it is a matter that goes to the core of the administration of justice.

We are all familiar with the principle that justice must not only be done but must be seen to have been done. In Galaxy Paint Company Ltd v Falcon Guards Ltd [1999] eKLR the Court of Appeal had this to say on this issue:

“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 seeking 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.”

Before addressing the issue of the threshold to be met in an application for recusal I wish to state that the conduct or behaviour of the prosecution counsel that caused this court discomfort is that on 12th May 2015 she was said to have three other matters in other courts. Together with this case makes four cases in total. Now, given that dates are taken after consultations and after reference to our respective diaries, this court could not understand how the prosecution counsel managed to fix for herself, on the same day and in different courts, four criminal matters all scattered in all the four courts of the Criminal Division before the judges who handle murder trials. Efficient management of one’s diary ensures that one does not take more cases, and in different courts, than one can handle in a day. This court could not understand why the prosecution counsel could not find it befitting to attend this court and explain her circumstances. Better still, this court could not understand why the prosecution counsel could not seek to address this issue before 12th May 2015 to ensure no inconvenience was caused either to the defence, the court or to the witnesses. This would not have been the first time for this prosecution counsel to do so before this court. In Cr. Case No. 98 of 2011 where Ms Mwaniki was the prosecution counsel, she took steps by writing to this court beforehand on 3rd February 2015 to request for adjournment because she was not available on the dates when that matter was coming up for hearing. Counsel has also prosecuted before this court before and she knows this court’s stand on certain issues like court attendance. This court prefers the counsel to attend court in person and explain why the case cannot proceed unless when such counsel is not within Nairobi or due to circumstances beyond their control.

The reason for this is twofold, first because a prosecution counsel just like defence counsel are both officers of this court as well as counsel in their respective sides. They must balance both duty to this court and duty to their clients. Secondly, it is good practice to attend court and put your application before the judge. This shows accountability and responsibility on the part of the counsel. This is where I was coming from in insisting that counsel should attend court in person. It had nothing to do with her competence as a counsel or that of the office of the DPP in general. It had nothing to do with the witnesses or the family of the victim. It was a normal thing to do for the presiding judicial officer in the course of guiding the proceedings of a case and the operations of the court.

The test

The test to be applied in an application seeking recusal of a judge is an objective one. When dealing with proceedings for recusal of a judge on accusation of bias it is necessary to consider whether there is a **reasonable ground for assuming the possibility of 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 facts constituting bias must be specifically alleged and established. The court must carefully scrutinize the affidavits (emphasis added). (See In Metropolitan Properties (FG-C) Ltd v. Lannon & Others)

The Constitutional Court of South Africa had this to say on the issue of recusal of a judge in **President of the Republic of South Africa vs South Africa Rugby Football Union (1999) (4) SA 147 at page 177:**

“.....the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.”

In view of these authorities, I wish to ask this: can a reasonable, objective and informed person on the correct facts of this case reasonably apprehend that this court and the judge presiding over this trial cannot bring an impartial mind (a mind open to persuasion by evidence and submissions of counsel) to bear on the adjudication of this case?

I understood both Ms Mwaniki and Mr. Karigi as saying that other than the derogatory, harsh, or unsavory words this court is alleged to have uttered in reference to the prosecution counsel and the office of the DPP, this court exhibited bias in allowing the defence counsel an adjournment for 11th May 2015 and declining to allow the prosecution an adjournment on 12th May 2015. Would any reasonable, objective and informed person read bias on the part of the judge for commenting on the manner the prosecution counsel managed her diary for 12th May 2015? It is worth noting that the prosecution counsel attended all the other courts other than this court on that day. In my considered view the answer to these questions are in the negative.

What I am saying in this ruling is simply that the reasonableness of the apprehension that the judge will not bring an impartial mind to bear on the adjudication of this case must be addressed in the light of the oath of office taken to administer justice without fear or favour. As stated in **South African Rugby case** above, it must be assumed that this judge can disabuse her mind of any irrelevant personal beliefs or predispositions.

There is no evidence to support the allegations of bias. The judge is the presiding officer of the court and must guide its operations and proceedings without fear of being asked to recuse herself. If judges were to be asked to recuse themselves on any comment they make in the course of guiding proceedings and that is perceived to be biased against a party or on every application they allow or disallow the other party to a case then I wonder how many recusals there would be. We may run short of judges to preside over trials!

This court has, and endeavours to, always be guided by fidelity to the law. The court must exercise its discretion to allow or to decline to allow applications of whatever nature after taking into account that no prejudice is occasioned to the accused person and the victim. The court must be free to do this without being labeled impartial. The court must make enquiries as to the absence of any counsel where no good reasons are advanced for such absence or where the information given to the court is not sufficient to explain such absence. Had this court been in possession of all the facts as expounded by Ms Mwaniki on 14th May 2015 as to the challenges she was facing that day and the reasons why she found herself in such predicament it would have been in a better position to make its ruling without asking questions.

I think I have said enough to demonstrate that the prosecution has not persuaded this court why I should recuse myself. I find no merit in the application for my recusal. I will and do hereby dismiss the application for recusal and direct that new hearing dates be taken so that the business of the court in adjudicating this case may commence. I make orders accordingly.

Dated, signed and delivered this 26th day of May 2015.

S.N. Mutuku

Judge

In the presence of:

Ms Mwaniki for the Prosecution

Ms Kethi Kilonzo for the defence

Mr. Karigi for the family of the deceased

Mr. Raphael M. Kalungu, the accused

Mr. Daniel Ngumbi, Court Clerk