



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CRIMINAL APPLICATION NO188 OF 1992**

**BENSON KAPOYA MOSIRO .....APPLICANT**

**RICHARD MOI KAPOYA .....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The applicants, Benson Kapoya Mosiro and Richard Moi Kapoya are facing a charge of assault causing actual bodily harm contrary to section 251 of the Penal Code before the learned Resident Magistrate, Kibera, Miss Maranga in Criminal Case No 2406 of 1992. This case came up for hearing on the 23rd of April, 1992 before the said Court. The applicants were then represented by Mr Kantai. The complainant, David Peterson Kiengo was duly led by the prosecutor in his evidence-in-chief after which learned counsel for the applicants, Mr Kantai rose to cross-examine him. This is born out by the record of the Court. It was during cross-examination that differences arose between the learned counsel for the applicants and the learned trial magistrate now giving rise to the present application in which the said counsel moved this Court under section 81(1)(a); 81(3) and 81(4) of the Criminal Procedure Code seeking orders for the transfer of the said case to any other magistrate of competent jurisdiction other than Miss Maranga for trial and disposal.

From the affidavits filed by each of the applicants together with Mr Kantai, all dated 30th of April, 1992, he (Mr Kantai) noticed during his cross-examination of the complainant that the learned magistrate was not making any record of the evidence of the complainant. Instead, he observed that the learned magistrate was busy flipping through other files and was completely ignoring the questions he was putting to the witness or his reply hereto. He depones that it was all too easy for him to see what the learned magistrate was doing because the proceedings were being conducted in chambers which is also being used as a courtroom. There is only a table separating the bench and the bar. These facts are not disputed.

Having observed that the learned magistrate was not taking any notes, Mr Kantai depones that he stopped temporarily to ask the complainant any further questions. On noticing that he was not asking any more questions, the learned magistrate asked him to proceed. He then put four further questions to the witness which he duly answered but once again he observed that the magistrate had made no record of such evidence. The magistrate then sat back in a relaxed manner and demanded to know from the counsel the nature of his instructions regarding the case. Mr Kantai depones that he informed the learned magistrate that the questions which he was putting to the witness were in line with his instructions. The magistrate then emphatically told him that she would make no record of the evidence of the complainant during cross-examination unless the counsel first explained the nature of his instructions. When counsel refused to disclose his client's case, the learned magistrate told him that he was wasting her time and that he

should withdraw from acting for the accused persons. He then insisted that the learned magistrate should record her remarks that he was wasting the Court's time. The magistrate then put aside the file and invited the counsel to record the evidence if he wanted to do so. Between 10.30 am and 11.30 am she did not touch the said case file while the advocate and the accused persons waited. She ignored the plea made by Mr Kantai to proceed with the case or disqualify herself. These facts are fully supported by another advocate, Mr Mwangi Mbuthia who had attended the same Court for other matters. He depones as follows:-

“4. That after the first prosecution witness gave evidence-in-chief, I noticed that the trial magistrate was not making any record.

5. That after sometime, Mr Ole Kantai stopped asking questions and I understand this to be an attempt by him to allow the trial magistrate to record the proceedings.

6. That instead the trial magistrate asked him to tell her what his instructions were in default she would not make any record.

7. That I noticed a lot of hostility on the part of the trial magistrate. She in fact threw the file aside and merely told Mr Kantai that he could take the (court) file and record what he wanted to record.

8. That by the time I left the courtroom at about noon, Mr Ole Kantai had made futile attempts to be heard. Even his application that the trial magistrate disqualify herself fell on deaf ears. It was in fact not recorded.

9. That it seemed to me that the action on the part of the trial magistrate embarrassed Mr Ole Kantai a great deal.”

Both applicants deponed that after the open hostility shown to their counsel by the learned magistrate who threw the court file aside, they remained in Court until lunch time. The Court then adjourned.

They waited until 2 pm but the learned magistrate did not come back to Court. At about 4 pm, the learned magistrate called both of them in her chambers and told them that they did not need any advocate for an assault case and that the advocate could just complicate the case. They replied that they had confidence in their counsel whom they had given full instructions. The learned magistrate then told them that their case would proceed for hearing on the 10th of June, 1992.

As a result of what transpired in Court on this day, both applicants (accused persons), deponed that they feel that the learned magistrate cannot accord them a fair and impartial trial.

Due to the gravity of the matters raised in the supporting affidavits of the applicants and their counsel, this Court decided to call for the original court file from Kibera Court so as to peruse the proceedings that took place before the learned magistrate on the 23rd of April, 1992. From the record of the Court, it is clear that when Mr Kantai rose to cross-examine the complainant (PW1), no evidence was recorded. Below the proceedings: “xxd Mr Kantai”: The record shows that the 2nd accused (applicant) had asked to be given time to engage another lawyer as their counsel had gone away and told them to take another lawyer but this is disputed.

Learned state counsel did not find it necessary to ask the learned magistrate to file any replying affidavit regarding her conduct of the proceedings in this case on the 23rd of April, 1992. She was satisfied with the record and the material placed before this Court in form of affidavits to which I have referred that there were sufficient grounds disclosed for allowing this application. I agree with her. It is most unfortunate that a situation such as the one described could have happened in one of our Courts presided over by such a senior officer whose oath of office demands that she should discharge her judicial functions with utmost good faith and impartiality devoid of any real likelihood of bias as would be sufficient to vitiate the proceedings or adjudication.

In deciding what real likelihood of bias will suffice in this regard, one has to be guided by common sense and by certain legal principles which the Courts have from time to time laid down as applicable to this type of case. In the case of *R v Justice of Queen's Court* (1908) 2 IR 235, Slade, J described "bias" in the following terms at page 294:

"By 'bias' I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must in my opinion be reasonable evidence to satisfy us that there was a real likelihood of bias. I do not think that mere vague suspicious of whimsical, capricious and unreasonable people could be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds – was reasonably generated but certainly were flimsily, elusive, morbid suspicion should not be permitted to form a ground of decisions."

Although it is difficult to discern from the record what was operating in the mind of the learned trial magistrate which could have made her to adopt the kind of attitude complained of, counsel for the applicants stated off record, that the learned magistrate had proposed that the parties should reconcile. This was perfectly in order as such reconciliation is provided for under section 176 of the Criminal Procedure Code especially in cases such as the one that was before the Court. Counsel then explained to the Court that they had first attempted reconciliation but failed. As to whether this is what had upset the learned magistrate is difficult to tell but there is no room for conjecture in matters such as this one where the accused persons were faced with a criminal charge and it was of fundamental importance to them that justice should not only be done but should manifestly and undoubtedly be seen to be done. Perhaps, the principle to be applied was more succinctly put by Lord Denning, MR in the case of *Metropolitan Properties v Lannon* (1969) 1 QB 577 at page 599 in the following words:-

"In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the Chairman of the tribunal or whoever it maybe, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did, in fact, favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances there was real likelihood of bias on his part, then he should not sit. But if he does sit, his decision cannot stand. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman, as the case may be, would or did – favour one side unfairly at the expense of the other. The Court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'."

The question which I must now ask is this: Should the learned magistrate have declined to record the evidence of the complainant in cross-examination unless the nature of the defence case was first disclosed? To begin with, the defence had not yet started on their case and so the stage where the learned counsel for the accused persons should have given an outline of the defence case had not yet reached. In any event, the learned magistrate had not called upon the prosecution to outline the nature of their case before the start of the trial and it was most unreasonable to call on the defence just before the start of their cross-examination to outline the nature of their case. Furthermore, the learned magistrate only called upon counsel for the accused persons to state the nature of his case after it had been observed that she was not making any record or taking notes of the evidence of the complainant in cross-examination and yet his evidence-in-chief had been recorded. By putting aside the court file and inviting the counsel for the accused to record therein whatever he wanted, the learned magistrate displayed a rare conduct of bias in the same way as she advised the accused persons that they did not need any legal representation in an assault case. I think that it is safe to say that anyone who was in Court on that day including Mr Mwangi Mbuthia, advocate, who had come to that Court for other matters, was right to hold the view that the learned magistrate was openly biased in favour of the prosecution. The applicants therefore rightly thought, as they say, that the learned magistrate could not accord them a fair and impartial trial. If she could refuse to record the evidence of complainant under cross-examination, she may as well decline to record the evidence of the applicants in their defence.

For reasons given, I allow the application and direct that this case be heard *de novo* by another magistrate of competent jurisdiction. The Kibera P M Criminal Case No 2406/92 shall forthwith be transferred to the Chief Magistrate, Nairobi for re-allocation where the applicants will now appear on the 10th of June, 1992.

I further direct that a copy of this ruling be sent to the learned magistrate, Miss Maranga for her records.

Orders accordingly.

**Dated and delivered at Nairobi this 27th day of May, 1992.**

**S.O OGUK**

**JUDGE**