REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL CASE NO. 29 OF 1991

CHARLES KOIGI WAMWERE……. 1ST ACCUSED

KOIGI KARIUKI…..……. 2ND ACCUSED

GEOFFREY KUGU KARIUKI…… 4TH ACCUSED

VERSUS

REPUBLIC…….. RESPONDENT

RULING

Before me is an appeal application for orders that I disqualify myself from the conduct of this case. The applicants are the three accused in this case. It should be pointed out at the outset that initially there were 8 accused persons. They all faced treason charges. Proceedings against four of them were discontinued when the Hon. The Attorney General entered a nolle prosequi. One of the remaining accused persons is admitted in hospital suffering from high blood pressure among other illness. An order was made for him to be tried separately when he will be medically fit for that purpose so those whom this application concern are, Charles Koigi Wamwere (the 1st accused); Mirugi Kariuki, (3rd accused), and Geoffrey Kugu Kariuki (4th accused).

The main basis of the application is that during the conduct of the proceedings in this case on 31st January, 1992, I conducted myself in a biased manner against all the accused persons and their respective counsels. Consequently they are apprehensive that I am unlikely to dispassionately conduct the proceedings hereafter. There are other grounds, but to my mind they are ancillary to the above ground, I will never to them at a later stage.

The nature of the bias complained about is not that I have an interest in the case. It is that the manner conducted myself showed open bias against all the accused persons and belittled both themselves and their respective advocates.

Submissions were made to me by the applicants' respective counsels and the learned Deputy Public Prosecutor, Mr. Benard Chunga, for the State on, amongst other things, the test to be employed when bias is suggested. Mr. G.B.M. Kariuki, was initially of the firm view that the test is an objective one. He cited several English authorities in support of this view. Later however, he drifted and concluded that the test is a subjective one. Both Ms. Martha Njoka for the 3rd accused and Dr. Khaminwa who conducted the case for the 4th accused on behalf of Mr. Musiili, advocate, concurred with him. The learned Deputy Public

Prosecutor, was of a different view. I have read the authorities they cited, notably, **Metropolitan Properties Co. (F.G.S.) Ltd –v- Lannon & Others (1969) IQB 577;The King –v- Sussex Justices [1924] IKB 256; R –v- Justices of Sounderland [1901] 2 KQ 356; Maina Wa Kinyatti –v- R. Criminal Appeal No.60 of 1983 (unreported); In The Application by M.S. Patel [1913 – 14] 5 KLR 66; R –v- Hashimu [1968] EA 658, and John Brown Shilenje –v- [1980] KLR 132,** amongst others. It is quite clear to me that the test is objective. The jurisdiction to disqualify oneself from a case is derived from the common law. It is a discretionary jurisdiction. It must, therefore, be exercised on the basis of facts and sound legal principles. The test to be employed must of necessity be objective.

In the Australian case o**f The Queen –v- Watson; Ex Parte Armstrong [1976] 136 C.L.R 248,** the High Court of Australia, after going through several English and Australian decisions came to the conclusion that the test is objective – that is to say there must be circumstances which a reasonable man would think it likely or probable that the trial Court did or would favour one side unfairly at the expense of the other. That is what Lord Dannin, M.R. said in the **Metropolitan Properties Co, cas**e.

The same issue came for consideration and decision in a later Australian case of **Raybos Australia Property Ltd & Another –v- Tectran Corporation Property Ltd & Others** [**1986] 6 NSWLR 272.** The Court after going through both English and Australian cases, among them the one I cited earlier, held, that it is the actually of bias or the existence of grounds for reasonable apprehension of it which requires this disqualification of a Judge from sitting in a particular case.

So the test to me appears to be this. An applicant who alleges bias must either prove bias or grounds which suggest bias or raise a reasonable apprehension of it. It is not what the accused thinks. It is what any reasonable man observing the conduct of proceedings is likely to conclude.

An issue was also raised as to the standard of proof. The issue was resolved by the **Maina Wa Kinyatti case** (above). It is proof on a balance of probalities.

So the position of the matter as I understand it is that a judge is duty bound to disqualify himself if by objective standards, and on a balance of probabilities it has been shown either that he was biased or that grounds exist for a reasonable apprehension of it. That is a duty a judge has to exercise for the interests of justice.

The duty to disqualify oneself is however, matched by an equal duty not to disqualify oneself. The Court in the Australian case of **Raybos Australia Property Ltd & Another –v- Tectran Corporation Proerty Ltrd (**supra) while emphasizing the principle of law that justice must be seen to be done held – relying on the holding in **Re Renaud, Ex Parte CJL [1986] 60 AL J.R. 528**; 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 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,"

The decision is persuasive. I adopt that reasoning in this case.

In summary the position is as follows, at least as I understand it. The onus is onus is on the applicant to establish the actuality of bias or grounds for reasonable apprehension of it. The application for a Judge to disqualify himself is not a light matter. So although the standard of proof is on a balance of probabilities, reasonable grounds must be established in support of the suggestion of bias.The Judge against whom bias has been suggested, has a duty to disqualify himself when such grounds have been established or shown to exist. The Judge has an equal and matched duty not to disqualify himself because of the wider interests of justice, if a reasonably good case has not been made out or does not exist.

Before I set out the facts which this application is grounded. I consider it pertinent to point out, in general terms only, the respective roles of Judges and Advocates. Judges individually have the duty to decide matters before them impartially in accordance with their assessment of the facts, and their

understanding of the law without any restrictions, influence, inducements, pressures, threats or interferences, direct or otherwise, from any quarter or for any reason.They are supposed to and are infact duty bound to be independent vis-avis their judicial colleagues and superiors. In Kenya where the Judiciary is hierarchically organized, decisions of a given judge are subject to an appeal, where the law so permits, and any aggrieved party is free to enter an appeal without any obstruction, restriction or discouragement from the judge whose decision is in question. Where the law permits review judges should freely repent if the circumstances so warrant and decide differently.

It is the duty of judges to handle with expedition matters which are brought before them as justice delayed is justice denied. They are required to fully reflect on a matter before a decision flows from them. In the conduct of proceedings they must balance relevant considerations. They are duty bound to control proceedings and must not let proceedings to deteriorate into disorder.

I have not attempted to exhaustively deal with the role of judges. I have highlighted only specific aspects which I consider relevant in the matter under consideration.

Like judges, lawyers or advocates, require the freedom to do their work. In the performance of their work they are supposed to be independed – not subject to direction, control or other influences – Lord Ignlis, summed up the duties of an advocate thus: "An advocate in undertaking the conduct of a cause in this court enters into no contract with his client, but takes on himself an office in the performance of which he owes a duty, not to his client only, but also to the Court, to the members of his own profession, and to the public. From this it follows that he is not at liberty to decline, except in very special circumstances; to act for any litigant who applies for his advice and aid,…… while he the client may get rid of his counsel whenever he pleases, and employ another, it is by no means easy for a counsel to get rid of his client.

On the other hand the nature of the advocate's office makes it clear that in the performance of his duty he must be entirely independent, and act according to his own discretion and judgment in the conduct of the cause for his client. His legal right is to conduct the cause without any regard to the wishes of his client so long as his mandate is unrecalled and what he does bona fide according to his own judgment will bind his client, and will not expose him to any action for what he has done, even if the client's interests are thereby prejudiced." (see B**atchelor –v- Pattison & Mackersy [1876] 3 R (ct of sess) 914 at P.918.**)

Lord Denning M.R., in the case of **Rondel –v- Worsley [1966] 3 ALL ER 657,** stated the relationship of advocate and client with regard to the performance by the advocate of his work thus:

"It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his took to do what he directs. He is none of those things. He owes allegiance to a higher cause. It is the cause of truth and justice."

The House of Lords, in Rondel –v- Worsley [1967] 3 ALL ER 993 on appeal approved those remarks and itself held: at P.1013 as follows:-

"It would be a retrograde development if an advocate were under pressure unwarrantably to subordinate his duty to the Court to his duty to the client."

Before that the Court said, at P.1011 D &E: "I think that it must be true to say …….. that the duty undertaken by an advocate is one in which the client, the Court and the public concern ……To a certain extent the advocate is an amicus curiae."

At P.1027, the Court said:

"Both solicitors and counsel are always keen to win a case and, incidentally, to give satisfaction to their clients so far as this is compatible with their duty to the Court to their professional standards. This is as an inevitable a part of their human makeup as is the ambition of every judge to decide his cases right. Their danger rather lies in that they may be too keen to win. Thus to provide a spur is bad rather than good.

.....On occasions it is an advocate's duty to the Court to reject a legal or factual point taken in his favour by the judge or to remove a misunderstanding which is favourable to his own case. This duty is of vital importance to the judicial process..... It is hard for him to explain to a client why he is indulging in what seems treachery to his client because of an abstract duty to justice and professional honour. .....The court has and must continue to have implicit trust in counsel>'.

Because of the onerous duty an advocate as the law has granted him immunity from civil liability arising from words, conduct and course taken by him in court in exercise of that duty. It is protection which must be enjoyed not for any other cause, but the cause of justice. The House of Lords stated in the case above cited, at P.1025:

"But so important has it (court) considered the functioning of the judicial process ;that it has given a complete immunity even to words spoken mala fide or maliciously or irreleventaly.

Some may think that this is a mistaken view, in that it creates hardships for which it creates hardships for which there is no relief. But it has been consciously and consistently (and I think rightly) adopted by the courts of this courts, regardless of the hardship that it often causes, in order that a greater ill may be avoided. Namely, the hampering and weakening of the judicial process."

The foregoing are general principles. They are principles which provide guidance to the essential ingredients in the administration of justice. But what is their relevance here? Before tackling that issue, it is important to set out, as concisely as is possible, the facts and circumstances upon which this application is based.

I became seized of this matter on 14.1.92. Two consolidated applications seeking precisely the same orders were canvassed before me. Validity of the charge was the issue. He applicants contended the charge is invalid. He prosecution contended otherwise. He defence contended that in light of alleged defects the court lacked jurisdiction to take plea.

Among submissions made by the defence is one that "the information before court is incurably defective. They (defects) are not on the face of it but in the manner it was arrived at. The legal pre requisites absent in the information are twofold." – not framed by the committing court, and not framed in the course of committal proceedings," Therefore, the charge is null and void ab initio.

Under S.276 CPC the court was not called upon to exercise either appellate or revisionary jurisdiction. It gave its ruling on 20th January, 1992, 3.30 p.m. dismissing the both applications.

Immediately thereafter Mr. G.B.M rose to announce that he wished to make an application on beahld of the 5th accused. He was not then representing the 1sr accused, Koigi Wamwere. He was allowed to do so. In substance the application was the same as those I had ruled on. After hearing counsel in full I declined to hear submissions from the learned Deputy Prosecutor; as I was of the view, as still am, that the application was an abuse of the process of the court.

Immediately after the ruling (2nd ruling), Dr. Khaminwa stood up and indicated he had an application to make on behalf of 2nd 6th and 7th accused. It should be recalled that he was representing the three of them. However in the consolidated applications which led up to the reserved ruling delivered on 20.1.92, he ahad been indicated to be leading Ms. Martha Njoka for 3rd accused. He stated that the application he wished to make was on same terms as the consolidated applications.The submissions were the same. After he made the introductory remarks outlining the nature of the application, it became clear that the application could not properly be renewed. When leading Ms Martha Njoka in the consolidated applicants he had clearly stated that those applications would be a test case, and that a multiplicity of applications was undesirable. On that ground I disallowed counsel the opportunity to renew the application.

Mr. Thiongo appeared for 8th accused. He also stood up to make an oral application for an order striking out count 1 before accused persons could plead to it. His view was that at the time of the alleged offence there was no government in existence as by law established. He invited the court to take judicial

notice of that. He also raised other issued. His submission extended to the following day.Upon completing his submissions, it was obvious to me that the matters raised were totally extraneous to the recording of a plea, ill intentioned and therefore required no response from the prosecutor. I gave a ruling in terms and dismissed the application.

There was no other application made at least at that moment. So I proceeded to require Mr. Sagara, my court clerk to read out the charge which he did . The charge was interpreted into Swahili and Kikuyu because some of the accused persons said they were the languages they understood best.

I called upon the accused persons independently to respond to the charge.

Koigi Wamere had this to say. “I am unable to plead to the charge as framed. I wish to withdraw from taking part in these proceedings for the following reasons” The court did not consider the reasons were important at leas that stage and made a note to the same effect. I then entered a plea of not guilty.

Rumba Kinuithia: the 2nd accused said:

“I consider that this court lacks jurisdiction to take plea. Secondly the charge lacks constitutional validity. Thirdly the charge is incurable defective and incompetent.”

Mirugi Kariuki in pertinent part said:-

“I will not plead because of S.275 (1) CPC. There is an objection I would like to raise based on that section.”

I was of the view and recorded as much that the accused was refusing to pleas of malice. I invoked S.280 CPC and recorded a plea of not guilty.

Geoffrey Kuria Kariuki, was represented by Mr. Kauma Mussilli. Mr. Mussilli stated that his client had not been served with a copy of the information and copy of committal documents as required by S.251 Criminal Procedure Code. After submissions it became clear to me that learned counsel was indirectly reviving the original application for the striking out of the charge. I ruled on this matter, It was clear from the committal bundles that there was a note to the effect that each accused had been duly served with a copy of committal documents. I asked the accused to plead to the charge. His reply was:

“My position is that I am not ready to respond to the charge for reasons which my advocate gave and on which the court has ruled on.”

I therefore was constrained to enter a plea of not guilty. Thereupon the accused person stated that he would not participate in the trial until certain conditions were mmet.

Harun Wakaba was the next accused to be called upon to plead. He stated that he had instructed his advocate to raise some matters before he would plead. Mr. G.B.M. kariuki, was his advocate as earlier on stated. Mr. Kariuki rose and stated as follows:- “I wish to give notice to raise objection to the charge under S.275 (1) Criminal Procedure Code. The section presupposes that objection is taken soon after charge has been read. Issues I intend to raise are substantial”.

I asked him whether the objections were such that they could not be raised during an earlier objection to the charge. His answer was that the objections could not be raised before the charge was read out. He went on to say that he had advised his client to pleas to the charge first and he would raise the objections later, but that his client had instructed him that would not be prepared to plead to the charge. The reasons for that step, he said, would be stated latder. He added that it was him who had advised him not to plead to the charge in the manner required by law because certain Provisons of the law had not been complied with before plea could be taken. But the accused Wakaba when called upon to respond to the charge said:

“Court has behaved in most irresponsible manner.” He then started shouting loudly hurling insults at the

court and the government. I did not record that, but ordered for his exclusion from the court room in pursuance of the Provisions of S.77 (2) of the constitution of Kenya. I then proceeded to enter a plea of not guilty against him.

A that juncture Mr. G.B.M. Kariuki, stood up to give reasons why his client refused to plead. I ruled that the reasons which were intended to be given would serve no purpose at that stage. At that juncture Mr. Shamalla, then on record for 1st accused, stood up and applied that I disqualify myself, I asked him to raise the issue after plea but he refused. I was compelled to record a ruling to the effect that his client having already made a statement and a plea had been recorded he lacked the locus standi to raise the issue before the recording of pleas from the remaining accused was concluded.

Ms. Martha Njoka did not wish her client to pleas to the charge before she raised certain objections under S.275 Criminal Procedure Code. She urged the view that the objections the accused had raised earlier touching on the charge related to its validity; that the objections she intended to raise related to the defects on the face of the charge. The court posed a question to her, viz whether an application under S.276 Criminal Procedure Code doesn't in effect presuppose that an amendment to the formal defects on a charge cannot inject life into the charge and should therefore be quashed. Her response was that the first application merely concerned itself with the question whether or not there was in existence a valid charge before the courtAfter hearing the learned deputy public prosecutor, Mr. Chunga, the court ruled that the crux of an application under S.276 Criminal Procedure Code is whether or not here are defects in a charge presented to the court. It is the matter the court had ruled on earlier and could not therefore be revisited. The court then called upon James Hosea Gitau to plead to the charge. His reply was: "I associate myself with the sentiments and remarks my advocate made that there are defects which required to be rectified before I plead. I decline to plead>'

Dr. Khaminwa, then stoo up and made the following remarks:- "I received firm instructions from James Hosea Gitau to renew the application which the court ruled on yesterday and rejected same. I renew the application."

The court declined to rehear the application and entered a plea of not guilty.

The next accused to be required to plead was Joseph mwaura. He was then represented by Dr. Khaminwa. He submitted that his clients Rumba Kinuthia, Hosea Gitau and Joseph Mwaura had not been heard on the application he had intended to make earlier as to the validity or otherwise of the charge. Since I had already ruled on the matter I declined to rehear counsel on the matter, and called upon the accusedJoseph Mwaura to plead to the charge. The accused's response was a follows:

"I am snot going to plead. I do not think I will get justice from you."

The court then made the following order: "

That being the stance you take, I record a plea of not guilty.

Andrew Mureithi was the next accused. He indicated he wanted to be given an opportunity to consult his advocate before he would respond to the charge. He was duly granted the opportunity. While he was consulting with his advocate, I reverted to Rumba Kinuthia who had earlier pleaded to the charge but requested that he be given a second opportunity to respond to the charge in his own words. He said:

"I would like the court to record my response in my own words."

Acting on the basis of the behaviour his co-accused had shown I cautioned him to unequivocally plead, either guilty or not guilty, but not to introduce extraneous issues. He then responded as undr: "I wish to register my protest against not being allowed to hire counsel of my own choice. We were denied the opportunity of hiring Q.C.s (Queens Counsel). I register my protest against my counsel's denial of the chance to present my application before court. I had given Dr. Khaminwa specific instructions to make an oral application on my behalf. One of the issues he was going to raise is that the President had announced

our guilt in a public rally."

At that point the court interjected and told the accused that the matters he was alluding to were not material to the recording of a plea. The court went further to urge him to indicate whether he admitted or denied the charge. The accused replied: "S.275 Criminal Procedure Code refers. I would like to say something about it."

The court thereupon told him that his advocate had raised the issue and did not think it would be right to revisit it in light of the court's ruling which was on record in that regard. The accused thereupon stated:

"A warning was given to me by special branch during a stint of 12 days of torture at Nyayo House."

At that stage the court was convinced the accused was reluctant to plead to the charge. A plea of not guilty was then entered against the accused.

The 1str accused was Andrew Muriithi. When called upon to plead to the charge he responded as follows:-

"I have consulted my advocate and he had advised me to await the outcome of an application which Mr. Shamalla intends to make. He will address the court. Otherwise I decline to plead to the charge. I was told at Nyayo House that I would not get a fair trial. Inspector Kiarie told me that. He also told me I would not be given a chance to speak to the court. There will be no justice which will be done by this court. I have no faith in this court."

The accused then became rowdy, abusive and insulting. The court entered a plea of not guilty to the charge against that accused, as well, and ordered the accused's removal from the court room. He was the last accused.

Mr. Shamalla had indicated earlier he would make an application for my disqualification from conducting this case further. He had been told he could make the application after pleas had been taken from all accused persons. However when the time came I was not inclined to hear the application immediately. I made the following order:

"The court has had a lot of difficult time in taking pleas from the accused persons. The exercise is now over. Mr. Shamalla had wished to make an application for my disqualification from hearing this case. However in light of the order I am going to make the application may not, at least for now, be necessary. I enter a plea of not guilty in respect of all the accused persons. The will be remanded in custody until 23.1.92 when this matter will be mentioned before the Duty Judge with a view to fixing hearing dates and making further orders with regard to the hearing of the case."

All the foregoing details have as far as possible been extracted from the record. It is upon them that the application before me is grounded. Learned Counsels for the accused persons submitted before me that there were other details which were left out, but a trial judge is not obliged to record all that takes place in court.

It will be quite ridiculous to expect a judge to record for example, "Accused now comes in. He sits down. He has scratched his head. He has shouted; He has insulted the court, he has insulted the Government etc……." A judge is enjoined to record in as detailed a manner as is practicable all the relevant matters. The choice of words in that regard is his. The manner of recording is entirely in his discretion. The complaint in that regard was ill motivated, frivolous and was designed to malign the court.

What are the other complaints raised in this application?

The first complaint on the face of it, is a legal issue. In the ruling delivered at 3 p.m. on 20th January, 1992, I had held that the information or charge as laid was in my view prima facie, valid. The accused persons could therefore plead on to it. Learned counsels for the accused persons were of a contrary view.

They were unwilling to let their clients to plead to it. They in fact advised and encouraged them not to plead to the charge. They renewed the application for the charge to be quashed for being invalid or defective. They were not, in law, entitled to renew the application as it is contrary to the criminal procedure.The accused persons' right, if they felt aggrieved, was to appeal against the holding either immediately, if the law so permits, or at the end of the trial as considered appropriate. The defence advocates are seasoned advocates. They have long experience in matters of criminal procedure practice. Their training and duty as advocates should have but did not oblige them either to abide by the ruling or lodge an appeal against it. They opted for a different Course. This court, as the record would bear it, inquired from them whether it was proper to renew the same application which had been ruled on and rejected.They dodged the issue.

It is a cardinal principle that freedom to express opinion must not be carried too far. It must not be left to deteriorate into disorder. The court must control the proceedings. It must keep order. It is a power which must be exercised when it is clear what is said or intended to be said. If found to be irrelevant, abusive, insulting, or illmotivated, the court has the right and it is duty bound to stop further expression of the opinion or expression of that particular fact.

As the accused shows I let all the defence counsels their view known as to the nature of the applications they were making on behalf of their clients. It became clear to me that the applications were ill-mo0tivated, and were calculated to humper the course of justice.I ruled them to be an abuse of the process of the court. I was duty bound to do so.

It is clear from authorities and it would be clear even without them that where an advocate on the basis that he is acting on his client's instructions takes a course of behaviour which is not motivated by the desire to uphold justice, in doing so he engages in conduct which is contemptuous of the court and in some cases may be regarded as conduct subverting it. A lawyer should, by his training and experience, stick to the relevant, proper and not to be influenced by considerations other than those essential for the upholding of justice. Orderly administration of justice enhances justice. It is therefore an essential ingredient in that regard.

When a court rules an a matter, which is within its jurisdiction, by exercise of that jurisdiction, it may error or come to the right decision. In the ruling of 20th January, 1992, earlier on alluded to, I may have erred. Learned counsels or their respective clients for that matter, had no right to revisit the matter over and over again. They now say they should have been let to re-argue the matter, talk as much as possible concerning it, until the courtr comes to a finding in their clients favour.Such a course of conduct, and it was what the learned counsels were guilty of, in effect amounted to intimidation of the court using the judicial process. It was mischievious, contemptuous and calculated to humper the administration of the justice. The court could have and it had the power to deal firmly with that conduct but opted against it on the grounds that the circumstances as they were then could not warrant such a step.

The court always retains the right and the power to ensure that every person has a fair trial. It has the power to deal with any person including advocates who obstruct or subvert justice. If a party feels aggrieved with a decision reached by a court, the law says: "The remedy of the party aggrieved is to appeal to a Court of Appeal, …… or to take some step to reverse his ruling.**" See Sirros –v- Moore [1974] 3 WLR 359**.

The procedure learned counsels adopted is alien to our system of criminal justice. As I said earlier all the learned defence counsels in this matter are seasoned advocates. They are not ignorant of these things.

Then there is the second complaint of bias. Akin to it is the complaint that this court belittled learned counsels and their clients in this case, on 21st January, 1992.

That complaint should be looked at against the background of what the learned defence counsels are saying now. They are unanimous that the accused persons abused the court and said several other things, which under the laws of this country, would be termed as contemptuous. Dr. Khaminwa aptly summarized their behaviour thus:-

"What they said I had not witnessed in my long career as an advocate of this court,"'

They are not , however, in agreement as to what provoked outbursts by some of the accused persons. However, the second is clear on the matter, learned counsels for the accused persons had advised them not to plead to the charge. They told them they did not agree with the rulings of the court, and thereby made them believe the court had something against them. That provoked the hostility the accused displayed to the court. Wheich cause were the advocates serving by advising their clients as much? Certainly not the cause of justice. It must have been a cause which I must say was neither for the benefit of the accused persons nor for their administration of justice.

An accused person whether facing a serious or minor charge is entitled to a speedy trial and determination of his case case according to law and evidence. There one is represented his advocate is duty bound to facilitate a speedy trial. By Learned counsels for the accused advising their clients to refuse to co-operate with the court they set in motion events which only themselves are to blame.The court had no part in it. I earlier set out the legal position of an advocate. I propose to repeat here, a statement by **Lord Denning M.R. in Rondel –v- Worsley [1966] 3 ALL ER 657, viz:** "It is a mistake to suppose that he is a mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of those things. He owes allegiance to a higher cause. It is the cause of truth and justice."

Learned counsels are not being particularly candid when they say the court engaged in an exchange with the accused persons. The court was abused, yes. It was insulted, yes. Some of the accused persons became rowdy, yes. But at no time was there "a vilent" or other exchange as alleged by learned counsels (of course other than Dr. Khaminwa). By suggesting that there was an exchange they are trying to unjustifiably paint the most awkward picture of proceeding as they took place on 21st January, 1992, for personal ends.

The advocates conducted themselves in such a manner that their behaviour not only called into question their reputation as lawyers and officers of the court, but also it misrepresented the role of an advocate in the conduct of proceedings in court. In their desire to achieve their hidden agenda, they ended up subverting justice.

An advocate is not fee to say and do what he pleases untrammeled. He has the freedom to put forward any argument, approach his client's case according to his own absolute discretion, but subject to the requirements of proper behaviour, relevant consideration, truth, the requirements of law and justice, rules of procedure and evidence. He has a duty to assist the court in doing justice and making sure justice has been seen to be done. Wiothin those limits he has the liberty to represent his client without let or hindrance. When he decides to function outside those limits, he exposes himself to contempt, ridicule, and in some cases criminal sanctious.

An Irish Judge, Crampton J, said in the old case of **R –v- O'Connel ([2884] LR Ir 261 at P.312.** "the advocates of the bar as well as the judge upon the Bench are equal ministers" – In the temple of justice. Later at P.33 he said:

"Yet he (the advocate) has a prior and perpetual retainer on behald of truth and justice."

In **Kennydy –v- Broun [1863] 13 C.B.N.S.677, at P.737, Erle C.J said**:

"If the law is that the advocate is incapable of contracting for hire to serve he had undertaken an advocacy, his words and acts ought to be guided by a sense of duty, that is to say, duty to his client, binding him to exert every faculty and privilege and power in order that he may maintain that client's right, together with duty to the court and himself, binding him to guard against abuse of the powers and privileges entrusted to him, by a constant recourse to his own sense of right."

The manner in which learned counsels conducted themselves on the 21st January., 1992, and even subsequent to that date leaves no doubt in mind that they have sheltered behind the privilege which is granted to advocates engaged in the conduct of judicial proceedings to pursue undisclosed motives. If

there be any doubt in that, it is removed by what they said in court. They do not want this case to go on, at least at the moment. They would want it adjourned indefinitely. They opposed strenuously the fixing of hearing dates for this case. They have already told me they will make an application for the adjournment of this case sine die. Such request was put to Owuor J, but was rejected. It was also put to the Hon. The Chief Justice but in vain.

It should noted here, and all counsels have been reminding me, times on end, that the accused persons face a serious charge – treason. It is not a bailable offence. So that when the learned defence counsels urge that the case be put off indefinitely, they are in effect saying the accused persons be denied justice, as justice delayed is justicedd denied. Will an adjournment therefore serve the interests of justice? Is that what the learned defence counsels are propounding? With due respect to them they are not coming out clearly to say what they are after. It does not require any legal mind to see that the attitude of all the defence lawyers is to create obstacles on the way of justice at every stage. The conduct of the accused persons on the 21st January, 1992 is explainable from that standpoint.They were advised and encouraged by their advocates to behave they way they did. The record bears that out.

Clearly there is no basis for any accusation or suggestion of bias. The accused persons and their advocates are clearly acting in concert to subvert the administration of justice. This court has been anxious to see that this case proceeds to trial without delay. But it has been bedeviled with numerous applications all of which different judges have ruled to be unmeritorious. They want to impose their will on the court. Justice is not their aim.

The other complaints relate to the orders of adjournment this court made on 21st January, and 13th October, 1992, respectively. The complaints are clearly frivolous, vexatious and an abuse of the process of the court. I do not propose to spend any time on them. Nor is it essential to consider the complaint Ms. Martha Njoka raised belately. It was that the court repeatedly interrupted them as they made submissions in support of the spate of applications before it on 20th and 21st January, 1992. The complaint was absent in her submissions in chief.None of the other defence counsels raided it. It was either raised as an afterthought, or because she stumbled upon the remarks in Lord Denning's Book. The Due Process of Law, and she thought the remarks were a good ammunition with which to attack the court. Whatever her motive was for raising the complaint, let her be informed that worse things have been said to us and aobut judges in the course of our work. They have not nor are they likely to deter or divert us from dispensing justice according to law and the evidence.

This application when looked at in light of all I have stated above and the facts and circumstances of this case, clearly lacks merits. It was to my mind made with a view to delaying further, the commencement of the trial of this case. Let it however, be known that courts are not without power to deal firmly with conduct calculated to hamper or obstruct the course of justice.

It is in the public interest that the prompt and speedy finalisation of cases be not hampered or obstructed unwarrantably, directly, or otherwise. It is also in the interests of justice that justice must not only be done, but must also be seen to be done. Each is a genuine interest of society. Neither can be held to be universally paramount over the other. The courts must endeavour to satisfy both.

The public has a general and permanent interest in the general administration of justice and the general course of the law. That is why judicial proceedings are held in public. In the instant case certain dramatic events took place in court as earlier on stated. It was on the basis of those events that this application was brought or appears to have been brought. The public were entitled to be informed whether the events and conduct which was displayed by the accused persons and their advocates accord with the law and practice in the administration of criminal justice.

In this ruling I have endeavoured to state categorically the view of the law on the role of judges and advocates. The court did express displeasure, in particular concerning the conduct of all the learned defence counsels hitherto. In doing so it has not minced its words. The interests of justice demanded that I do so immediately to obviate further mischief and to correct the wrong impression which must have been created by them. The interests of justice demand that the public be not habituated to think that an

advocate can do and say whatever he pleases in court untrammeled. It was the more essential because the conduct has tremendously hampered further progress in this case.

However there is also the requirement of justice that it must not only be done but it must be seen to be done. The first interest, I hope has been served. I hope the court will not thereafter be driven to take extreme gesture measures (which it has avoided to take in the past in the hope that good sense will prevail to deal with what is developing into a bad situation. The second interest also needs to be satisfied. I have no doubt in my mind that hitherto the courts have done justice to the accused's case. However the remarks UI have made in this ruling when considered objectively may, although they need not, cause the accused persons feel apprehensive that I might not dispassionately try their case. In light of that likely and probable fear and in the interests of justice I consider and rule that this case be continued by another judge. It is ordered that this case be mentioned before the Duty Judge on 2nd November 1992 for further orders. All accused remanded in custody until then.

Dated and delivered at Nairobi this 27th day of October

1992.

S.E.O. BOSIRE

JUDGE