



**Republic v Maina & another (Criminal Case E1183 of 2023)
[2025] KEMC 37 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEMC 37 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CRIMINAL CASE E1183 OF 2023
PA NDEGE, SPM
MARCH 13, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

FRANCUS MUTURI MAINA 1ST ACCUSED

NICHOLAS NJOROGE MWANGI 2ND ACCUSED

RULING

1. In this case the accused persons herein, Francis Muturi Maina, And Nicholas Njoroge Mwangi, (hereinafter referred to as the ‘1st accused or applicant’ and ‘2nd accused’, respectively) have jointly been charged with the offence of Stealing c/s 268(1) as read with section 275 of the *Penal Code*. They were initially charged separately before the cases were consolidated. They have denied that on diverse dates between 13/04/2023 and 13/05/2023 at Shamma Estate in Jogoo Shopping Centre in Gilgil sub-County within Nakuru County, jointly with others not before court, they stole assorted goods as per the list attached to the charge sheet, all valued at Kshs. 1,200,000/= the property of Shamma Wangui.
2. They are facing a related charge of Conspiracy to Commit a Felony C/S 393 of the *Penal Code*, in the second count, wherein they also denied that on the same dates and at the same place, jointly with others not before court, they conspired together to commit a felony namely stealing and that they stole goods as per the same list, of the same value, and belonging to the same complainant.
3. The 1st Accused person on 26/06/2023, denied both counts, but admitted the alternative charge of Handling Stolen Goods c/s 322 of the *Penal Code*. The 2nd accused person was represented by a counsel, while the 1st accused person is unrepresented. Facts, which are essential component of a plea of guilt, were then not ready and the prosecutions kept on praying for adjournments till 07/01/2024 when he changed his plea. The hearing was then fixed to commence on 19/02/2024.



4. The hearing in this matter has however not been able to take off for various factors most of which were outlined in my earlier ruling dated 23/01/2025. The 1st accused person presented a letter dated 21/11/2024 wherein he wants this court to recuse itself. The letter disclosed some of the grounds for the application mainly that this court refused the complainant's prayer to withdraw the case against him; that this court granted harsh bond terms which it has refused to review, that the court grants hearing dates that are far apart, and finally that the court has not responded to the accused person's application for plea bargain.
5. This court noted that the issues raised in the letter are serious and may impact the trial process herein and as summarized in its ruling dated 23/01/2025. Since a trial process involves not only the 1st accused person alone, but several other parties, including the 2nd accused, the prosecutions and the complainant/ victim, all of whom are represented by legal counsels this court directed that the letter be served on all the other parties for them to be involved in the recusal application therein.
6. The prosecution and the 2nd Accused has objected or opposed the application for recusal. The 2nd Accused filed a Replying Affidavit, sworn by himself at Nakuru on 18/02/2025. He reiterated the history of this matter and more specifically the various applications that the 1st accused has made which have mostly been geared towards delaying the progress of this matter. He thus averred that the application for recusal is misconceived, devoid of merit, fatally defective and ought to be dismissed in the first instance as it is an abuse of the court process and time. That rule 5 of the Judicial Service (Code of Conduct and Ethics) Regulations, 2020 sets out grounds upon which a person may require a judge to recuse himself as:
 - a. Personal bias concerning a party or advocate
 - b. Had the judicial officer acted as an advocate for a party in the suit
 - c. Close relation with a party to the suit; and
 - d. If the judge or spouse may have a financial interest on the case
7. Further that the grounds upon which the 1st accused person wants the Honorable Court to recuse itself are not valid grounds as the issue of bond or bail terms are matters of judicial discretion, while withdrawal of charges by a complainant and plea-bargaining considerations are matters that should be taken up with the prosecutions. On the issue of dates, the 2nd accused averred that dates are issued as guided by the court's diary and hence the same cannot be used as sufficient grounds for recusal. That the applicant is operating on the assumption of projected and falsely perceived bias by the Honorable Court and that he has not provided any factual material showing any bias or proven any existing bias. That the application for recusal has been brought in bad faith and is only meant at wasting the court's time. That any member of the judicial bench is committed to his oath of office and is ready and willing to carry out his constitutional mandate without fear or favour in an unbiased manner as there is a presumption of impartiality by every member of the bench. That a recusal application should be used for safeguarding the administration of justice as well as the integrity of the judiciary and not to be used for attacking members of the bench or as a tool for delaying administration of justice. That recusal application should be made in good faith, honestly and with truthfulness and that the present application lacks the said elements. That the present application is brought with the intent of undermining the independence of the judiciary.

Determination

8. The Court considered the application, and the affidavit in opposition to the application. The issue for determination is whether the order sought of recusal should be granted or not on the allegations.



9. Justice Muigai in *Wambua Vrs Republic* [2024] KEHC 10375 (KLR) (29 July 2024) (Ruling) stated that the principles governing recusal in this jurisdiction are not well settled. In *Jan Bonde Nielson Vrs Heman Philipus Steyn & 2 Others* [2014] eKLR the court observed that:

The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in *R v David Makali And Others C.a Criminal Application No Nai 4 And 5 Of 1995* (unreported), and reinforced in subsequent cases. See *R v Jackson Mwalulu & Others C.a. Civil Application No Nai 310 OF 2004* (Unreported) where the Court of Appeal stated that:

“...When courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a 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 test is objective and the facts constituting bias must be specifically alleged and established...”

10. In *Philip K. Tunoi & Another Vrs Judicial Service Commissioner & Another* [2016] eKLR the Court of Appeal adopted the test for recusal propounded by the House of Lords in *Porter Vrs Magili* [2002] 1 All ER 465, where it stated that: ‘The question is whether the fair minded and informed observer, having considered the facts, would conclude that was a real possibility that the tribunal was biased.’
11. The same position was taken by the Supreme Court (per Ibrahim J.) in *Jasbir Rai And 3 Others Vrs Tarlochan Singh Rai And 4 Others* [2013] eKLR where he observed that:

The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable.

12. The principles buttress the standards of conduct enacted in the Judicial Service (Code of Conduct and Ethics) Regulations 2020 dated 26th May 2020. Under Regulation 21 Part II of the said Code of Conduct, a Judge can recuse himself or herself in any of the proceedings in which his or her impartiality might reasonably be questioned where the Judge: -
- (a) Is a party to the proceedings;
 - (b) Was, or is a material witness in the matter in controversy;
 - (c) Has personal knowledge of disputed evidentiary facts concerning the proceedings;
 - (d) Has actual bias or prejudice concerning a party;
 - (e) Has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;
 - (f) Had previously acted as a counsel for a party in the same matter;
 - (g) Is precluded from hearing the matter on account of any other sufficient reason;
 - (h) Or a member of the Judge’s family has economic or other interest in the outcome of the matter in question.



13. Regulation 9 of the Judiciary Code of Conduct emphasizes the importance of impartiality of a Judge. Regulation 9(1) provides:

A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with Articles 10, 27, 73(2) (b) and 232 of *the Constitution* and shall not practice favoritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices
14. Taking a look at the issues or grounds that the 1st accused person wants the court to disqualify itself, I do agree with the response given by the 2nd accused person. In my earlier ruling where I issued directions as to the manner of proceeding herein, I did summarize the history of the matter and the various applications that the 1st accused has made. I need not repeat them herein. I see nothing to point at biasness as alluded to in the application herein. I personally do not know any of the parties herein and holds no interest, financially or otherwise, in this dispute. I have nothing to gain or benefit from by being biased against the 1st accused herein.
15. The Supreme Court in *Jasbir Singh Rai & 3 Others Vrs Tarlocham Singh Rai & 4 Others* (2013) eKLR stated that;
 - (6) Recusal, as a general principle, has been much practiced in the history of the East African judiciaries, even though its ethical dimensions have not always been taken into account. The term is thus defined in *Black's Law Dictionary*, 8, h ed. (2004) [p.1303]: "Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of Interest."
 - (7) From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised.
16. This Court is alive to the binding Constitutional standard in conduct of Court proceedings as provided by Article 50 of *the Constitution*. This entails that each party is entitled to a fair hearing that includes appearing before an independent and impartial Tribunal or Court.
17. *The Constitution* further outlines the independence of ODPP in conduct of Criminal prosecution under Article 157 of *the Constitution* specifically Article 157 (6-12) on the conduct of prosecution of cases and issues such as withdrawal of cases, decision to charge or turning or making one a witness or plea bargaining/ diversion are all within the mandate of the independent office of the DPP.
18. In the absence of cogent and tangible evidence of actual bias or interest or misconduct by the Court and more so without objection from the ODPP Defense Counsel or Victim's Counsel, I find no legal basis for recusal of the Court.
19. These authorities cited above and Judicial Service Commission Code of Conduct 2020 Regulations on recusal are clear as outlined above. A party applying for recusal of a judicial officer must do so upon clear grounds. In my view, the allegations made by the 1st defendant are vague, unsubstantiated and intended to undermine the independence of the court. In the circumstances, the Court finds that in the absence of specific misconduct or bias on its part, that the application for recusal is not proved and is hereby dismissed for lack of merit.



It so ordered.

**RULING DELIVERED DATED & SIGNED IN OPEN COURT IN NAKURU LAW COURTS
THIS 13TH DAY OF MARCH 2025**

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Court interpreter: Janet

Prosecution Counsel: Macharia

2nd Accused Counsel: Kimoriot

Vitim's Counsel: N/A

1st Accused: Present

2nd Accused: Present

Victim: N/A

Kimoriot: We can have a date for hearing. We also pray for a copy of the ruling

1st Accused: I do agree.

