Republic v Omollo & 43 others (Anti-Corruption Case 10 of 2018) [2018] KEMC 100 (KLR) (Anti-Corruption and Economic Crimes) (26 October 2018) (Ruling)

Republic v Lilian Mbogo Omollo & 43 others [2018] eKLR

Neutral citation: [2018] KEMC 100 (KLR)

REPUBLIC OF KENYA

IN THE ANTI-CORRUPTION MAGISTRATE'S COURT

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION CASE 10 OF 2018

DN OGOTI, CM

OCTOBER 26, 2018

BETWEEN

REPUBLIC .... PROSECUTOR

AND

LILIAN MBOGO OMOLLO & 43 OTHERS & 43 OTHERS & 43 OTHERS .... ACCUSED

RULING

1. By way of a Notice of motion supported by the Affidavit of one Richard Ethan Ndubai dated 17th October 2018 and 16th October 2018 brought under Certificate of Urgency, the applicant sought for the following orders;-
    1. That the application be certified urgent and service be dispensed with.
    2. That the Honourable Douglas Ogoti Chief Magistrate do hereby recuse himself from hearing and determining this matter.
    3. That costs of this application be provided for.
2. The grounds upon which the application was based are as follows;-
    a) The applicants are accused persons in ACC's No. 10, 13, 16 and 17 of 2018 scheduled for hearing on 29th of October 2018.

    b) The court relied on social media as one of the grounds for denial of bail and thereby introduced extraneous unverified facts.

c) That the court stated the charges facing the accused person are worse than murder despite such a comparison having no basis in a prejudice evidence in the mind of the court.

d) The court in furtherance of its bias against the accused persons relied on social and print media without interrogating the veracity of the information thereon.

e) The court soon thereafter after denying the accused persons application for bail, granted other accused persons facing similar charges bail clearly showing that the court was biased against the accused persons in this matter.

f) The applicants are reasonably apprehensive that Hon. Douglas Ogoti will not allow good counsel, fairness and impartiality to prevail during the hearing scheduled to commence on the 29th of October 2018 and thus ends of justice will not be met.

g) It is just and equitable in the circumstances of this matter that the matter be heard as a matter of urgency.

3. On 19th October 2018, the respondents filed their grounds of opposition:

 1. That the application lacked merit and was an abuse of the courts process.

 2. That the application does not disclose the conditionality and test for recusal of a Judicial Officer.

 3. That the application is based on flimsy grounds and means to defeat the ends of justice considering that it has been filed on the eve of the trial hence seeks to delay the trial process.

4. They also relied on the replying affidavit of Evan Kanyuira, Senior Prosecution Counsel in the ODPP dated 19th October 2018 and filed on the same day. I have also read and discerned their affidavit. In addition to the above I have also read and understood the written submissions from both the applicants and respondents.

5. There are several authorities quoted and relied on by both sides each in support of their positions. These are well known authorities in the field of applications for recusal. Some of them have been quoted from time to time in pronouncements made by superior courts and the Court of Appeal and even the Supreme Court on matters recusal. Hence, I will not necessarily delve into each and every one of them because they contain almost all the applicable conditions and tests to be applied when a court is dealing matters of recusal.

6. Going back to the application by the applicant(s) I have the following observation concerning the affidavit filed in support thereof. Paragraph 1 of the affidavit indicates the deponent as having the authority of the other applicants to swear the affidavit in support of the instant application. In criminal cases, the charges are brought against each accused individually and even when jointly charged the case proceeds on the known assumption that each accused has understood the charge and is required to answer the charges singularly and not as a team. This issue must be understood well. The principle of vicarious liability is not applicable on criminal cases. It is only applicable in civil cases. Hence an applicant cannot purport to swear an affidavit on behalf of other accused persons. Criminal responsibility is individual. It cannot be allocated to another person and hence cannot be taken over by another person. Hence, I do find that paragraph in support of the application is erroneous and is expunged from the record.

7. I perused and discovered the affidavit of Richard Ethan Ndubai which had 24 paragraphs. The said paragraphs contained the complaints of the applicant. From all those paragraphs, there seems to be only 2 complaints that led the applicant to file an application for my recusal.

    1. He complained about my observation in the bail ruling on the 5th of June 2018.

    2. He also complained about the manner in which the court handled the pretrial.

8. From the above issues the applicant submitted that there was perception of bias against the accused since the court had a particular outcome sought to be achieved by impartially assessing the evidence and using prejudicial knowledge not introduced in court.

9. The respondents opposed the application through their submissions and the affidavit of Evah Kanyuira dated 19th October 2018. What is discernible from therein is that the trial magistrate exercised his discretion as required when dealing with matters of bail. There was no bias. No evidence of threats, or any threats on trampling of the Constitutional Rights to a fair trial by the magistrate. That applicant failed on the test applicable for the recusal of a Judicial Officer and suspicion alone could not justify grant of orders sought.

10. Black Law Dictionary, 8th Edition (2004) (P. 1303) defines recusal as follows:

> " Removal of oneself as a judge or policy maker in a particular matter (especially) because of conflict of interest."

11. The same dictionary at page 171 defines the word bias as follows;

> " Inclination prejudice, ... judicial bias. A Judge bias toward one or more of the parties to a case which the judge presides. Judicial bias is usually insufficient to justify disqualifying a judge from presiding over a case. To justify disqualifications or recusal, the judge's bias usually must be personal or based on some extra judicial reason."

12. From the above definition a party seeking recusal of a judge must demonstrate personal grounds or extra judicial grounds in his or her possession to enable the judge recuse himself. That is the test to be applied.

13. The principles applicable when considering recusal were extensively dealt with in authorities No. 3 of the applicants in the case of Barnaba Kipsongok Tenai -Vs- Republic (2014) eKLR. The argument on this is found at argument No. 15 of the appellant's submissions. This is a classic case of where the trial magistrate was disqualified from hearing a case because of her differences which were personal with the defence counsel.

14. In the same case, it was noted that the object in view, in the recusal of a Judicial Officer, is that justice as between the parties be uncompromised. That due process of the law be realized, and be seen to have its role. That the profile of the rule of law in question be seen to have remained uncomprised.

15. The most common grounds or examples for recusal or disqualification of a judge are: where the Judicial Officer is a party: or related to a party; or is a material witness or has a financial interest in the outcome of the case: or had previously acted as a counsel for a party.

16. In the same case, Ngenye J. while relying on an American case, Perry V. Schwarzenegger, 671F (9th circ. February, 2012), it was held that the test for establishing a judge's impartiality is the perception of a reasonable person, this being a "well-informed, thoughtful observer who understands all facts" and who has "examined the record and the law; and thus "unsubstantiated suspicion of personal bias in

prejudice will not suffice. While also quoting from the case of *Patrick Ndegwa Warungu -Vs- Republic in the High Court at Milimani Criminal Application No. 440 of 2003*, Ngenye. I took view that the withdrawal of the applicant's bond on allegations of the complaint does not constitute enough reason to transfer he case bearing in mind the fact that the magistrate after the result of investigation reinstated the applicant's bond. It was clear impartiality and proper administration of justice, she held that such actions did not constitute bias.

17. The allegations of bias by the applicant as contained in his affidavit and submissions by his counsel are as follows from the various paragraphs of their submission.

> Paragraph – 19 that during the Ruling on bail the court noted as follows;-
>
> Those actions lead to economic sabotage and deny Wanjiku (the common citizen) basic rights including but not limited to good health, education, employment, food, shelter and leads to death. The court takes Judicial Notice of the fact that social media has been airing instances of economic crimes on almost day to day basis."
>
> Paragraph 23 - "I find that the charges facing accused persons are grave offences affecting the economy of the whole country thereby posing a serious threat to the financial health of the country and in the opinion of the court, which can lead to anarchy: threat to peace and threat to National Security. This in itself is a compelling reason why bail should and is hereby denied."
>
> Paragraph 31 – "Pre-trials are not cast on stone had the defence allowed the 1st pre-trial to proceed, they would have realized that though their concerns were genuine, which I agree their 'fears' were unfounded."

The above observations made the foundation of the application by the applicant.

18. The Rulings complained of were those of 5th of June 2018 on denial of bail and 12th of June 2018 on the pre-trial.

19. With utmost respect to counsel and applicant both Rulings were meant pursuant to applications by both parties i.e. the prosecution and defence. On the one of 5th June 2018, the court pronounced itself on the issue of bail. The parties went to the High court and on June 19th 2018 a Ruling was delivered in their favour. If both counsel and applicant had bothered properly to peruse and read through the authorities supplied and relied on, on the Ruling of 5th June 2018, they would have found out that those are pronouncements of eminent judges of the superior courts and supreme courts. The authorities were all cited in the said Ruling in case any party wishes to confirm. The deductions thus complained of were as a result of literature supplied by the parties either in support or in opposition to the said application.

20. The Ruling made on 5th June 2018 was made pursuant to the provisions of Article 49 of the *Constitution*. The said Article is operationalized by Section 123 and section 123A of the Criminal Procedure Code Cap 75 Laws of Kenya. Hence the pronouncements were made on the known procedural and substantive laws as concerns bail. This was a decision based on the law. It was not a decision based on unknown extra-judicial imaginations so that the court can be accused for considering extra judicial issues in order for the applicant to satisfy the other requirement of bias besides personal bias. The question then to ask is, should pronouncements on competent applications, which pronouncements are made by Judicial Officers form a basis for grounds of recusal?

21. On the other complaint on the order of 12th June 2018 on pre-trials, the applicant complained that the court sought to defeat the ends of justice of having the pre-trial conducted by the prosecution only since

the defence was not supplied with any document prior to the pre-trial conference. The observations of the court were observations on internationally accepted standards during pre-trials in criminal cases. A pre-trial in a criminal case can take several stages or be done more than once. The purpose of pre-trial is for full disclosure. As against civil cases, investigations in criminal cases is continuous. Disclosure in criminal case is continuous. This has been held so in different superior courts decisions but I need not delve into then as it is not the subject of this application. However, the framers of our constitution were alive to this fact. Article 50(2) (j) of the *Constitution* provides as follows:

> " To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."

22. The court was conscious and aware of the provision when it pronounced itself that "pre-trials are not cast on stone" and that still remains the position. It is also erroneous for the applicant to argue that the prosecution conducted the pre-trial. A Pre-trial is a management tool meant for case management. It is the court that conducts pre-trials for proper case management and not the parties. The pre-trials are meant to ensure smooth flow of cases by managing the case properly from the start to the end. It ensures the trial process is known, the fundamental right to a fair trial for the accused is guaranteed and most of all to vouch for the integrity of the trial itself devoid of ambushes. (See pre-trial order No. 5 of the pre-trial Ruling). The question to ask again is, could giving pre-trial guidelines be a ground for a judicial officer to recuse him/herself?

    Justice Said A. Chitembwe while dealing with the issue of his own recusal in Civil Appeal No. 138 f 2013 in the High Court of Kenya at Kakamega made several observations some of which are produced hereunder. Brackets are my emphasis.

23. The Interim Order (in this case issue of bond) were granted by the court as it is the discretion of the court to grant or deny orders. Costs (in this case bond terms) are assessed by the court and cannot be a subject of bias on the part of the court.

24. The adversarial nature of our Judicial System requires that the presiding (Judge) Judicial Officer be an umpire and balance the hearing process between the parties (in this case on effective pre-trial process). Any Judicial Officer presiding over a court is supposed to take charge of the proceedings (needless to say by an effective case management process).

25. The applicant's application was filed 5 months after the last courts pronouncements complained of. The parties were advised in the Ruling of 12th June 2018 the manner in which they were to proceed when dissatisfied with pronouncements of the courts that are within the law i.e. Revision or Appeal. Instead they opted for recusal. This issue of recusal of a judicial officer has been dealt with in many cases.

26. In the case of Kaplan and Straton -Vs- Z. Engineering Construction Ltd & 2 others 2000 KLR which was referred to by Chitembwe J. Justice Lakha was asked to disqualify himself. One of the grounds of the request being that the judge had two lunches with one of the counsel appearing in that matter. The judge declined the request and held as follows;-

> " Although it is important that Justice must be seen to be done. It is equally important that Judicial Officers 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 disqualifications of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

27. All that is complained of by the applicant herein is the manner in which the court conducted the bail application and pre-trial. The orders were granted lawfully and there was no complaint of bias until

the current application filed 5 months after the pronouncement complained of. Allegations of bias are usually directed at the conscious of the judge and his impartiality in handling the matter. But waiting for 5 months down the road to raise an issue of bias at the eve of the main hearing to start only a week after filing of the application is not being sincere.

28. When Justice Hatari Waweru was asked to disqualify himself in the case of *Andrew Alex Wanyendeli -Vs- The Attorney General and Kenya Railway Corporation: Nairobi Milimani HCCC No. 844 of 2005* on allegations of being biased due to several comments he had made when the matter was proceeding, he noted as follows;

> " There is nothing like a litigant veto of the court or judge hearing his matter, litigants cannot choose their judges Applications for disqualifications of judges should not be allowed. That would tend to erode public confidence in the courts and determination of justice."

29. Again, as noted by Chitembwe J. while associating himself with sentiments of Mutuku J. in the case of Abdiwahab Abdullahi Ali -Vs- Governor of County Government of Garrisa & other (2013) eKLR when she stated the following: (which I also associate myself with).

> " One word of unsolicited advice to my brothers, legal counsels involved in this case. The same way this court and the presiding officer (Judicial) holds the parties and counsels with respect and in high esteem, the same way, the court and the presiding officer demands respect from parties and counsels appearing before it. It is a mutual relationship. The parties and counsels practicing before this court must also be willing to be guided by the presiding officer. They must submit to the rule of law. Any party dissatisfied with a Ruling of the court is at liberty to file an appeal. That party would be acting within his rights and that is why our courts are hierarchical. I want to believe that we have moved away from the old era where it used to be a "jungle outside there".

30. In conclusion the rulings made by the court both on 5th and 12th of June 2018 were Rulings made pursuant to applicable laws. The courts used its discretion. The courts are allowed to take judicial notice of a notorious factor by dint of Section 60(1)(0) of the *Evidence Act* Cap 80 Laws of Kenya. To ask the court to recuse itself when such discretion has not been challenged amounts to threats to Judicial Officers otherwise known as Judicial threat. There is no evidence of personal bias that has been demonstrated against the applicant. Further no demonstration has been put forth to show that the pronouncements of the court were based on extra-judicial influences. Filing an Application for recusal 5 months after a Ruling 7 days before the case starts is evidence of a very well-orchestrated scheme by the applicant to throw spanners into the case and forestall its hearing starting in 3 days from today.

31. As noted by Chitembwe J, "The apprehension by the applicant that he will not get justice in this court is a normal apprehension whereby each party who has a matter in court is apprehensive as to the decision of the court would make. Interpreting the apprehension that the court would be biased I opine is a wrong shot at the target. The aspect of judging encompasses the unpredictability of the decision.

32. As observed by Achode J in Election Petition No. 10 of 2017 Hassan O. Hassan and another -Vs- IEBC & Two others that;-

> " The application by the Petitioner appears to be a critique of the decision of the court which have gone against him and the proper forum for such contention would be the appellate arena. The decisions by the court per-se, do not amount to evidence on bias of the court.

The unsubstantiated suspicion of bias or prejudice by the petitioner herein, does not suffice as reasonable grounds for recusal."

33. That particular finding is applied Mutatis Mutandis in this application and I do find no proof of bias. I do find that the application dated 17th October 2018 has no merit and is hereby dismissed.

DELIVERED ON THIS 26TH DAY OF OCTOBER 2018.

D.N. OGOTI

CHIEF MAGISTRATE

In the presence of;-

Ongendu holding brief for Ogamba for applicant.

Kahoro holding brief for Omollo for respondent.

Korir Court Assistant.

Dated this 26th day of October 2018.

D.N. OGOTI

CHIEF MAGISTRATE

26.10.2018