

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL REVISION NO. 1 OF 2025

AND
MISCELLANEOUS CRIMINAL APPLICATION NO. E024 OF 2025

JANET OKADAPAU MURUNGA
APPLICANT

VERSUS

REPUBLIC OF KENYA.....
RESPONDENT

RULING

1. The revision application, in Busia HCCRREV. No. 1 of 2025, arises from a letter, dated 8th May 2025, addressed to the Office of the Director of Public Prosecution, Busia, and copied to the Presiding Judge, with relation to proceedings in Malaba MCCRC Nos. E168 of 2025 and E193 of 2025, which arose out of the same incident.
2. The concern, in the letter, related to the handling of the matter in Malaba MCCRC No. E193 of 2025, around how a Martin Jimmy Omukule Murunga was handled by the trial court in open court. Mr. Murunga was listed as a witness in the matter. He was allegedly humiliated in open court, and he, as complainant, was expressing lack of faith in the trial magistrate, Hon. O. Momanyi. When the copy of the letter was received by the court, I ordered that a revision file be opened.
3. The Motion, in Busia HC Misc. Criminal Application, dated 30th April 2025, by Janet Okadapau Murunga, is for the recall of the files in Malaba MCCRC Nos. E168 of 2025 and E193 of 2025, for the purposes of consolidation, and stay of proceedings, on the principal ground that the 2 cases are related; and the transfer of the cases from that court. The main concern is not even that, but that raised in the letter of 8th May 2025, concerning how Hon. Momanyi handled Mr. Murunga, which, in his view, was indicative of bias. There are allegations of regular visits by a Member of the Busia County Assembly, who has stood surety for 1 of the accused persons in the matter, and who is alleged to be friends with a named member of judicial staff and Hon. Momanyi.
4. A response was filed, being an affidavit sworn by Mr. Gibson Gumo Mayaba, a prosecutor, with the Office of the Director of Public Prosecutions, based at the Malaba Law Courts, on 30th June 2025. He explains that the 2 files have already been consolidated, by order of the trial court. He further avers that, when the applicant raised the issue of lacking confidence in Hon. Momanyi, she was advised to file a formal application, to disclose the grounds for the recusal, that she was seeking orally. He avers that the instant application is premature, as it should have been filed at the trial court, in the first instance.

5. The applicant filed a supplementary affidavit, sworn on 11th September 2025, where she states that Mr. Mayaba was hostile to her, and he could not defend her rights, as a complainant. She avers on matters relating to bond, arguing that it ought to have been directed that a pre-bail report be availed, before the decision to grant personal bond could be taken. She avers that Mr. Mayaba should have raised the issue himself, inclusive of filing a written application for recusal.
6. The respondent then filed a preliminary objection, dated 20th June 2025, founded on grounds that the application was defective and incompetent, for joining the Office of the Director of Public Prosecutions, as a respondent; that the Office of the Director of Public Prosecutions was not a proper party, as the complaint was raised against the magistrate, and the orders ought to be sought against the magistrate, and not the Office of the Director of Public Prosecutions; that the Office of the Director of Public Prosecutions is being saddled with claims outside of its role; and that the recusal ought to have been sought first before the trial magistrate, before moving to the higher court.
7. I will start with the preliminary objection, for its determination has the potential of disposing of the application as well. The test, set in *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696 (Sir Charles Newbold P, Duffus VP & Law JA), is that a preliminary objection should be on a point of law, which is capable of disposal of the suit, on such pleas as jurisdiction, limitation of actions, or exclusion clauses.
8. The principal argument, here, is that the applicant is seeking transfer of the matter from the Malaba court to another court elsewhere, on grounds of bias, yet she has not exhausted the process at the trial court itself, by way of asking the trial magistrate to recuse himself from the matter, before moving to a higher court. It is argued that that was communicated to the applicant, but she did not take that route, but chose to move to the higher court instead. *Joseph Odhiambo Omondi vs Republic* [2017] eKLR [2017] KEHC 235 (KLR) (Mrima, J) and *Republic vs Michael Koskei* [2022] eKLR [2022] KEHC 2858 (KLR) (E. Ogola, J) are cited.
9. So, is there legal justification for that argument, that the applicant ought to have sought recusal of Hon. Momanyi first, before Hon. Momanyi himself, before she moved to the High Court?
10. The offence, which is the basis for these proceedings, was allegedly committed, within the Teso North Sub-County, and, therefore, within the local limits of the jurisdiction of Malaba Law Court. It is, therefore, the magistrates at Malaba, who have the territorial jurisdiction to handle the matter. Hon. Momanyi sits at that court, and he has the requisite jurisdiction to hear and determine the dispute.
11. A matter can only be transferred out of the courts having territorial or geographical jurisdiction, to courts that are outside it, for serious reasons, which are fully established. One of them could be that the magistrates, at the local court station, do not have substantive jurisdiction, in terms of the subject matter of the case, which is not the case here. The other could be on security grounds, where, perhaps, it would be safer, for everybody involved, that the matter be handled

outside of the territory, which is not the case here. The other could be conflict of interest, where the available judicial officers are conflicted, for one reason or other, either on account of being acquaintances of the parties involved, in one form or other, which is not the case here. Recusal is the other, where none of the judicial officers, at the station, is available to hear the matter, for all having recused themselves from it, for one reason or other. It would be in the event of such, that transfer may be ordered.

12. The matter, in this case, revolves around recusal. There are insinuations raised, concerning the complainant not having faith that she would get justice before Hon. Momanyi. It would appear that no specific application was made, either orally or in writing, for Hon. Momanyi to step aside from the matter, or to recuse himself. It would appear that Hon. Momanyi read those insinuations as suggesting that he ought to recuse himself, and it would appear that it was counselled, off the record, that the complainant ought to take that course. It would appear that she did not, instead she resorted to piling pressure, for Hon. Momanyi to let go of the matter, through letters being written to the Office of the Director of Public Prosecutions, copied to the Presiding Judge of the High Court, and the filing of an application for transfer of the matter away from Malaba.
13. The counsel, given by Hon. Momanyi, to the complainant, is the only way out, file a formal application, laying out the accusations against Hon. Momanyi, before him, for him to consider whether or not he should recuse himself. The courts are vested with jurisdiction, by the Constitution and legislation, to handle all the matters placed before them, subject only to jurisdiction questions, and the factors discussed in paragraph 11 above. It is not open, to a judicial officer, to pick and choose which cases to hear, and which ones he should not hear. It is equally not open, to the parties, to choose which judicial officers should hear their matters. Forum-shopping is not allowed. It is a justice and access to justice issue.
14. There is room, of course, for parties to move for recusal of presiding judicial officers, from the matters assigned to them, for good cause. What would amount to good cause, was laid out in *Rai & 3 others vs. Rai & 4 others* [2013] eKLR [2013] KESC 20 (KLR) (Tunoi, Ibrahim, Ojwang, Wanjala & Ndung'u, SCJJ). See also *Farah & 2 others vs. Abdi* [2025] KEELC 6369 (KLR) (Omange, J) and *Doshi & 2 others vs. Director of Public Prosecutions & 6 others* [2025] KEELC 7248 (KLR) (Angote, J). I need not go into the specifics.
15. The recusal or disqualification, of a presiding judicial officer, can only be sought before the presiding judicial officer himself. It is not a matter to be considered by another judicial officer, or even a higher judicial officer. Courts do not engage in gossip. The person, seeking the recusal, should be brave enough, to confront the presiding judicial officer, against whom the recusal is sought, albeit in a respectful manner, with the allegations, and should be bold enough to ask him to let go of the matter. In any case, that presiding judicial officer is entitled to hear and to be heard, with respect to the allegations being made against him, before he can make a decision, on whether to get out of the matter.

16. According to *Republic vs. David Makali & 3 others* [1994] KECA 100 (KLR) (Cockar, Omollo & Tunoi, JJA) and *Republic vs. Jackson Mwalulu & 8 others* [2004] KECA 76 (KLR) (Omollo, Tunoi JJA, & Deverell Ag. JA), the test for recusal is objective, hence the facts, constituting bias or partiality, must be specifically alleged and established. That then would require that proceedings be conducted formally, where a formal written application, setting out the facts, seeking to establish the bias or conflict, is filed and argued, to establish the objectivity of the claim. It would require much more than just rising from within the well of the court, and orally making allegations, a deep inquiry is called for.
17. The applicant was counselled to move the court, formally, for such an inquiry to be conducted. She did not do so. Instead, she opted for other manoeuvres, or strategies, of sidestepping that inquiry, by literally escalating the matter, to what she considered to be the superiors of Hon. Momanyi, by way of asking the High Court to order transfer of the matter, and pressuring the Office of the Director of Public Prosecutions, to, one way or other, influence the removal of Hon. Momanyi from the matter. That is not the way to approach the issue.
18. The High Court would have no jurisdiction, to take out of the hands of the trial magistrate, a matter that he is seized of, without just cause, or a case being made out for it, and, more importantly, before that magistrate has been given an opportunity to inquire into the matter, by way of determining a recusal application placed before him. The High Court cannot pull the matter away from the hands of the trial magistrate, in the guise of its transfer, unless proper grounds for transfer are established. Where issues, around bias or conflict, are raised, the matter should not be placed before the High Court first, before the trial magistrate has had an opportunity to deal with a recusal application, where facts have been placed before him, for him to assess whether grounds exist for such recusal. It would be upon the magistrate declining the recusal sought, after that inquiry, that the matter can be escalated to the High Court.
19. The second ground or objection is that the Office of the Director of Public Prosecutions is being scapegoated over the matter, yet the primary complaint is not about the Office of the Director of Public Prosecutions, but the trial magistrate. I do not quite understand the foundation for this objection, for the Office of the Director of Public Prosecutions would always be the respondent in such an application, for the court is not a party to the proceedings, and it ought not be made a party. The allegations, made by the complainant, that Mr. Mayaba was hostile to her, were made after the filing of the Preliminary Objection, and they could not have provoked the objection.
20. There is a point in that though. In criminal proceedings, prosecution is at the instance of the Office of the Director of Public Prosecutions, except for private prosecutions. Under Article 157 of the Constitution, the Office of the Director of Public Prosecutions is vested with more or less exclusive jurisdiction to conduct public prosecutions. Matters are reported to the police, who conduct investigations, and present their findings to the Office of the Director of Public Prosecutions, who then initiates prosecutions, on behalf of the public. In public prosecutions, the parties are the Office of the Director of Public Prosecutions,

usually styled as the Republic, and the accused person. The complainant is not a party, in the criminal matter, but is treated as one of the witnesses for the prosecution.

21. The law does allow limited interventions by the complainant, where it would be permissible for a complainant to instruct an Advocate to watch brief, in the proceedings, working together with the Office of the Director of Public Prosecutions. The views of the complainant could also be taken, with respect to bail/bond and sentencing. Beyond that there would be little room for intervention, for the prosecution is driven by the Office of the Director of Public Prosecutions. The complainant cannot, for example, appeal against the verdict of the trial court. If he is aggrieved, the Office of the Director of Public Prosecutions would file the appeal on his behalf. I doubt that a complainant would have basis for seeking revision of any of the decisions of the court. In my humble view, to allow interventions of that sort, would cause confusion, and it has the potential of undermining the role and function of the Office of the Director of Public Prosecutions.
22. In that respect, there would be merit in the argument, by the Office of the Director of Public Prosecutions, that there is something fundamentally wrong with the application. The prosecution herein was mounted by the Office of the Director of Public Prosecutions, as public prosecutor. It was not initiated by the complainant, as a private prosecutor. To that extent, the complainant is not a party to the criminal proceedings before the trial court. As she is not a party to the criminal proceedings, and as she is not the prosecutor, she would have no standing to seek the sort of the orders sought in the application, dated 30th April 2025. Those orders can only be sought by a prosecutor. I am talking of consolidation of suits, stay of criminal proceedings and transfer of criminal cases.
23. The decisions, on these kinds of matters, should be at the sole discretion of the Office of the Director of Public Prosecutions, who need not consult the complainant on them. It is not even within the province of a complainant to apply to court to ask a presiding judicial officer to recuse themselves, that ought to come from the prosecution. To allow a complainant to seek these types of prayers, or to intervene in that kind of a manner, would be to weaken the hand of the Office of the Director of Public Prosecutions, and to undermine the independence and discretion of that office.
24. Consequently, it is my finding and holding, that the complainant had no standing to make the application, dated 30th April 2025, so long as the prosecution of the criminal case was at the instance of the Office of the Director of Public Prosecutions. The application was, therefore, improper and incompetent. It was a usurpation of the constitutional and statutory role of the Office of the Director of Public Prosecutions, which should not be allowed to stand; and the practice, of filing such applications, ought to be discouraged.
25. I shall, on that basis, uphold the preliminary objection, dated 20th June 2025. The effect of it shall be that the application, dated 30th April 2025, is misconceived and improper, and it is hereby struck out. The trial court files shall be returned

to the trial court, for the Office of the Director of Public Prosecutions to continue with the prosecution of the matters before the trial court. Should the complainant be minded to pursue the recusal quest further, there would be liberty to file a formal application, before Hon. Momanyi, inviting him to recuse himself from the matter, and a proper case for that should be laid out in the application. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS
17TH DAY OF NOVEMBER 2025.**

**W MUSYOKA
JUDGE**

**Mr. Arthur Etyang, Court Assistant.
Ms. Eva Adhiambo, Legal Researcher.**

Advocates

Mr. Nyongesa, instructed by Sospeter & Company, Advocates for the applicant/complainant.

Mr. Mayaba, instructed by the Director of Public Prosecutions, for the respondent.