Republic v Kamotho (Criminal Case E001 of 2025)
[2026] KEHC 2539 (KLR) (26 February 2026) (Ruling)

Neutral citation: [2026] KEHC 2539 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL CASE E001 OF 2025

DR KAVEDZA, J

FEBRUARY 26, 2026

BETWEEN

REPUBLIC ..... PROSECUTION

AND

SARAH WAIRIMU KAMOTHO ..... ACCUSED

RULING

1. This Ruling is pursuant to an application dated 8th December 2025 by the Accused, Sarah Wairimu Kamotho, seeking to have the ongoing part-heard proceedings before the High Court at Kibera in Criminal Case No. E001 of 2025 declared a mistrial and/or a nullity. She further prays that all rulings and orders made thus far be vacated, that the trial recommence de novo before a different judge, and that certain documentary and other evidence be expunged from the record. The Application is opposed by the Prosecution through a Replying Affidavit dated 29th September 2025 sworn by a Sarah Ogweno, Senior Assistant Director of Public Prosecutions.

2. The Applicant contends that the proceedings have been characterised by prosecutorial and judicial improprieties of such a fundamental nature as to render the trial unfair and unlawful. She alleges, inter alia, that the Prosecution improperly uploaded a substantial portion of the committal bundle onto the Court's digital platform, thereby reviving documentation not recognised in law and exposing the Court to evidentiary material prematurely. She further challenges certain directions issued by the Court, including the requirement for hard copy documents and inventories, and asserts that a ruling delivered on 29th January 2025 was procedurally irregular, particularly in relation to the admission of a report from another court and the sequencing of plea and medical assessment.

3. The Applicant also complains that the trial was conducted, in part, by affidavit evidence instead of viva voce testimony; that witnesses were not duly sworn; that she was directed to give evidence by affidavit in a manner exposing her to self-incrimination; that cross-examination and re-examination were curtailed; that an irregular "mini-trial" was conducted; and that the Court entered the arena of conflict by issuing

suo moto orders. She maintains that these matters cumulatively amount to a miscarriage of justice and render the proceedings a nullity.

4. The Prosecution opposes the Application, asserting that it has acted throughout in accordance with *the Constitution* and the law. It maintains that the Applicant was represented by counsel at all material times and that no objections were raised in relation to the impugned directions or procedures. The uploading of documents is described as an administrative step for formal registration of the matter, not an improper evidentiary act. The Prosecution states that all relevant material was supplied to the defence; that affidavits were properly directed in relation to bail; and that the Court acted within the law in conducting a mini-trial arising during proceedings. It further notes that three witnesses have already testified, including two formerly under the Witness Protection Programme who have since been discharged and cannot re-enter protection. It is contended that commencing the trial de novo would occasion prejudice and undermine the administration of justice. Counsel for the victims associated themselves with this position and emphasised the interests of the victims and the integrity of the process.

5. During oral submissions, learned Senior Counsel for the Applicant clarified that the motion was not one for recusal but for a declaration of mistrial and nullity. The State, however, submitted that in substance the Application amounted to a recusal motion and that any grievance with prior rulings lay by way of appeal rather than through nullification by the trial court itself.

6. In considering the matter, the Court observed that although recusal is not expressly sought, the prayer that the file be placed before the Presiding Judge for further directions raises questions ordinarily attendant upon recusal. The grounds advanced being allegations of partiality, improper conduct, and unlawful orders are directed at the conduct of the presiding judge. The Court therefore notes that substance, rather than form, must guide the characterisation of the Application.

7. The Court further reflects on broader procedural questions, including whether a party who participated in proceedings without objection, while represented by counsel, may subsequently challenge those proceedings wholesale upon a change of advocates; whether newly instructed counsel may reopen or invalidate prior directions not previously contested; and whether a trial court may properly be invited to declare its own proceedings a nullity, vacate its rulings, expunge admitted evidence, or effectively sit on appeal over its own decisions. These considerations frame the issues for determination in the Ruling and underscore the central question as to the scope of the trial court's jurisdiction in relation to its own proceedings and orders.

Issues for Determination and Analysis

8. The first issue for determination is whether this Court has jurisdiction to grant the prayers sought.

9. The Application invites this Court to declare its own proceedings a nullity, to vacate all rulings and orders previously made, to expunge documentary evidence admitted on record, and to direct that the matter be heard afresh before another judge. Although framed as a constitutional challenge, the gravamen of the Application is an attack on the legality and propriety of this Court's prior decisions.

10. The starting point is the well-settled principle on jurisdiction. In Owners of the Owners of Motor Vessel Lillian S vs Caltex oil (Kenya) Ltd(1989)KLR, the Court of Appeal authoritatively stated:

> " Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending

other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

11. Similarly, the Supreme Court in Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR held:

> " A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

12. No constitutional or statutory provision has been cited that empowers this Court to sit on appeal over its own rulings in the manner proposed. A distinction must be drawn between review, an inherent power within circumscribed limits, and an invitation to reconsider the legality or constitutionality of concluded determinations. The latter properly lies before an appellate court.

13. In National Bank of Kenya Ltd v Njau (Civil Appeal 211 of 1996) [1997] KECA 71 (KLR) (27 May 1997), the Court of Appeal cautioned:

> " Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested, as in this case, cannot be reviewed by the same Court which had adjudicated upon it."

14. Likewise, in Albino Mathom Aboug v Attorney General & 2 others [2018] eKLR, the Court observed:

> " The only avenue available to one who may be dissatisfied with a decision of a superior Court is that of appeal in the normal appeal process following the hierarchy of Court structure."

15. The Application before me challenges rulings, directions and findings already rendered. In substance, it seeks an appellate reconsideration. This Court cannot assume that role. If the Applicant believes that constitutional or legal errors have occurred, the proper recourse lies in appeal.

16. A further dimension concerns the conduct of the proceedings. The Applicant participated fully through several advocates without objection to the impugned directions. It is not procedurally tenable for newly instructed counsel to comb through certified proceedings and mount a wholesale constitutional challenge to matters previously acquiesced in, absent invocation of recognised review or appellate mechanisms. Litigation must have finality. A change of counsel does not re-open concluded interlocutory matters.

17. Accordingly, I find that this Court lacks jurisdiction to grant the principal prayers seeking nullification of proceedings, vacation of rulings, and expungement of evidence. Those matters fall within the province of an appellate forum.

18. The second issue is whether the Applicant has established a case for recusal. Although the Application is not expressly framed as one for recusal, its substance, allegations of bias, partiality, and unconstitutional conduct, necessitates consideration of that question.

19. In Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others (2013) eKLR, the Supreme Court addressed the issue of judicial recusal, stating:

> " Recusal, as a general principle, has been much practised 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, 8th ed. (2004) [p.1303]:"Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest."

20. Article 50(1) of *the Constitution* guarantees a fair hearing before an independent and impartial tribunal. Bias, whether actual or perceived, may warrant recusal. In Kibisu v Republic (Petition 3 of 2014) [2018] KESC 34 (KLR) (28 February 2018) (Ruling), the Supreme Court held:

> " (59) We agree that bias is prima facie a factor that may lead to a judge recusing himself from a matter. Such an action is meant to safeguard the sanctity of the judicial process in tandem with the principle of natural justice that no man should be a judge in his own case and that one should be tried and/or have his dispute determined by an impartial tribunal. This is what is provided for in article 50(1) of *the Constitution* thus:
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> > "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body".
>
> (60) What is bias? The Oxford English Dictionary defines bias thus: "as an inclination or prejudice for or against one thing or person".
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> The Blacks' Law Dictionary 9th edition defines the word bias as "Inclination; prejudice; predilection".

21. Hence, as one of the fundamental tenets of the Rule of Law is impartiality of the judiciary, in circumstances where bias is alleged and proved, then the pragmatic practice is that the particular judge or magistrate will as a matter of course recuse/remove himself from the hearing and determination of the matter.

22. The applicable test is objective. In Philip K Tunoi & Another v Judicial Service Commission & Another, [2016] eKLR, the Court of Appeal stated:

> " In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias."

23. More recently, in Gachagua & 5 others v Maingi & 80 others (Civil Appeal E829 of 2024 & E022 of 2025 (Consolidated)) [2025] KECA 790 (KLR) (9 May 2025) (Judgment) the Court reiterated:

> " The test is objective: whether a fair-minded and informed observer, having considered all the circumstances, would conclude that there exists a real possibility of bias. This standard is concerned, not with the judge's actual state of mind, but with the appearance of partiality as perceived by a reasonable observer."

24. The burden lies on the Applicant to establish cogent grounds. Bare allegations are insufficient. In Dari Limited & 5 Others v East African Development Bank [2024] KESC 58 (KLR). the Supreme Court underscored that an allegation of bias "goes to the very core of [a judge's] oath of office" and must be supported by persuasive material.

25. Applying these principles, the complaints advanced relate primarily to judicial directions: requiring hard copies and inventories; permitting filing of affidavits on bail; conducting a mini-trial in response to alleged witness intimidation; taking judicial notice of public interest; declining bail review absent remorse; calling for a probation report; and issuing preservation orders concerning the scene. Each of these arose within the ordinary exercise of judicial discretion in managing criminal proceedings.

26. No evidence has been demonstrated that I possess a personal interest in the outcome, harbour animus, or have predetermined the merits. The mere fact that evidentiary material was uploaded onto the Court's digital platform does not, without more, establish bias. As observed in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, that:

> " the mere fact that a decision-maker had prior knowledge of a matter or performed a statutory role does not, without more, amount to bias."

27. A fair-minded and informed observer, apprised of the full procedural history, would recognise that the impugned actions were taken within the Court's mandate to ensure disclosure, preserve evidence, regulate bail, and protect witnesses. They do not disclose a real possibility of bias.

28. It is also necessary to recall the countervailing doctrine of the duty to sit. Shollei v Judicial Service Commission & another (Petition 34 of 2014) [2018] KESC 42 (KLR) (3 July 2018) (Ruling), Justice Ibrahim expressed himself as follows:

> " 25. Tied to the constitutional argument above, is the doctrine of the duty of a judge to sit. Though not profound in our jurisdiction, every judge has a duty to sit, in a matter which he duly should sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office: "to serve impartially; and to protect, administer and defend *the Constitution*." It is a doctrine that recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties' right to have their cases heard and determined before a Court of law.
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> 26. In respect of this doctrine of a judge's duty to sit, Justice Rolston F. Nelson; of the Caribbean Court of Justice in his treatise – "Judicial Continuing Education Workshop: Recusal, Contempt of Court and Judicial Ethics; May 4, 2012; observed:
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> > "A judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason"

29. Judicial independence would be undermined were judges to accede readily to unsubstantiated allegations. Litigants have no right to select the judge who hears their matter. Recusal is a safeguard for fairness, not a tool for tactical manoeuvre.

30. Having carefully considered the grounds advanced, I am not persuaded that a fair-minded and informed observer would conclude that there exists a real possibility of bias. The allegations are either matters properly falling within appellate review or arise from routine case-management decisions taken in the discharge of judicial duty.

31. For the foregoing reasons, I find that this Court lacks jurisdiction to grant the substantive prayers seeking nullification of its own proceedings and orders. Further, the Applicant has not established grounds warranting recusal. The Application is therefore dismissed for lacking in merit.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 26TH DAY OF FEBRUARY 2026

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D. KAVEDZA

JUDGE

In the presence of:

Accused/Applicant Present

SC Pravin Bowry & James Gitau Singh for the Accused

Ms. Gichui for the Respondent/Prosecution

Karimi Court Assistant.