Kiboinet v Republic (Criminal Revision E084 of 2023)
[2024] KEHC 2932 (KLR) (22 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2932 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL REVISION E084 OF 2023

JRA WANANDA, J

MARCH 22, 2024

BETWEEN

HILLARY KIPKOSGEI KIBOINET ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Before the Court for determination is the Notice of Motion dated 14/06/2023 filed through Messrs Kutto & Kaira Nabasenge & Co. Advocates wherein the Applicant seeks orders as follows:

    i. Spent

    ii. Spent

    iii. The Honourable Court be pleased to review orders given by Hon. Richard O. Odenyo Senior Principal Magistrate on 13th June 2023 in Eldoret Chief Magistrate's Court Criminal Case No. 1173 of 2020; *Republic v. Hillary Kipkosgei Kiboinet* which orders issued warrant of arrest against the Applicant for failing to attend court.

    iv. In granting the above prayer, the Honourable Court be pleased to uplift the warrants of arrest issued against the Applicant and consequently reinstate his bond terms.

    v. That the Honourable Court be pleased to issue an order to the effect that warrant of arrests and cancellation of bond issued by Hon. Richard O. Odenyo Senior Principal Magistrate on 13th June 2023 against the Applicant in Eldoret Chief Magistrate's Court Criminal Case No. 1173 of 2020; *Republic v. Hillary Kipkosgei Kiboinet* be lifted pending the hearing and determination of the substantive Application for stay in Eldoret High Court Constitutional Petition No. E001 of 2023 as earlier directed by the High Court.

vi. The Honourable Court be pleased to direct the Hon. Richard O. Odenyo Senior Principal Magistrate to recuse himself from conducting and hearing of Eldoret Chief Magistrate's Court Criminal Case No. 1173 of 2020; *Republic v. Hillary Kipkosgei Kiboinet* for failure of impartiality and that the said criminal case be mentioned before Chief Magistrate for reallocation to a different magistrate.

2. The Application is premised on the grounds set out on the face thereof and is expressed to be brought under the provisions of Articles 49(1)(h), 50(2)(a), 159(1) & (2), 165(6) and 258(1) of the *Constitution* and Sections 123(2)(3), 362 and 364(1)(b) of the *Criminal Procedure Code*. The Application is then supported by the Affidavit sworn by the Applicant.

3. In the Affidavit, the Applicant deponed that he is currently facing criminal charges in Eldoret Chief Magistrates Court Criminal Case No. 1173 of 2020 and that he is out on bond, that the criminal trial was stayed on 29/03/2023 in Eldoret High Court Constitutional Petition No. E001 of 2023 pending hearing and determination of a motion seeking conservatory orders, that in staying the proceedings, Hon. Justice Nyakundi issued an interim injunction against the proceedings before the lower Court so as not to render the Petition nugatory pending the hearing of the motion seeking conservatory orders, that the said motion seeking conservatory order was due for hearing on 5/06/2023 but the High Court did not sit as the Judge was away on official duties, that despite the Court having stayed the lower Court proceedings, on 13/06/2023 the Honourable Learned Magistrate Richard O. Odenyo, Senior Principal Magistrate, ignored the said order and proceeded to issue warrants of arrest against the Applicant for failing to attend Court, that the Applicant's failure to attend Court was not deliberate and was due to the reasons that there was the superior Court order staying the trial in the lower Court, that the Applicant was away in Kitengela and had fallen sick, and that his Advocate was present and did represent him.

4. The Applicant deponed further that the Learned Magistrate ignored submissions regarding the stay that had been granted by the superior Court, that his Advocates sought for another date to appear but the Magistrate declined and issued warrants of arrest, that there being stay orders as explained, the Magistrate lacked the mandate, authority and jurisdiction to issue the warrants of arrest given that the Applicant was represented by an Advocate who had informed the Magistrate of the existence of the stay orders, the Magistrate therefore acted injudiciously , that it is in the interest of justice and good order of judicial practice that subordinate Courts should abide by the orders of Superior Courts, that the Magistrate has demonstrated lack of impartiality and exhibited impunity, that he has no mandate, authority, capacity or jurisdiction to overrule the Superior Court, it was not fair for the Magistrate to issue Warrants of Arrest at first instance without giving the Applicant an opportunity to come and explain his absence, that the Magistrate's haste in issuing Warrants of Arrest is a demonstration of bias, that since introduction of virtual Courts, parties have in most cases attended Courts through virtually without physical attendance, if the Applicant's presence was so crucial despite the matter having been stayed, the Magistrate could still have directed that the Applicant appears virtually, by dint of Article 165(6) of the *Constitution* as read with Section 362 of the *Criminal Procedure Code*, this Court has the mandate, power, authority and jurisdiction to revise orders given by a Magistrates which appear to be inappropriate, that the Magistrate has demonstrated bias in dealing with the matter by cancelling the Applicant's bond and issuing Warrants of Arrest despite the Superior Court having stayed the matter, the Applicant is apprehensive that the Magistrate may not handle the matter objectively as he seems not to be happy with the Applicant's pursuit of his constitutional rights in the Superior Court. He therefore urged this Court to give an order directing the Magistrate to recuse himself from the matter and that the same be mentioned before the Chief Magistrate for re-allocation to a different Magistrate.

Directions given on 22/06/2023 and 11/10/2023

5. When the matter came up before me on 22/06/2023, I granted the State-Respondent a period of 14 days to file its Response and also gave the parties liberty to file written Submissions. I gave similar directions on 11/10/2023.

Applicant's Submissions

6. Counsel for the Applicant filed his Submissions on 11/10/2023. For reasons that I shall state hereinbelow, I will only cite the portion of Counsel's Submissions touching on the prayer for recusal of the trial Magistrate (prayer 6). I will therefore not delve into the areas addressing the prayers for lifting of the Warrants of Arrest (prayers 3, 4 and 5).

7. In regard to the said issue of recusal of the Magistrate, Counsel cited Section 81(1) and (2) of the *Criminal Procedure Code* and submitted that the Magistrate has demonstrated lack of impartiality by issuing warrants of arrest against the Applicant and yet the Superior Court had stayed the trial, that the Applicant's Counsel was present representing the Applicant and despite Counsel informing the Magistrate that the trial had been stayed, the Applicant did not deliberately fail to attend court, the Magistrate ignored the submissions and proceeded to issue warrant of arrest the Applicant, the Magistrate issued the Warrants so as to intimidate the Applicant and therefore this is a clear demonstration that the Applicant will not get justice from the trial Court, it is clear that the trial Court has a predetermined mind which is to convict the Applicant regardless, that the Applicant has lost confidence in the said Court and it is only fair and in the interest of justice that this matter be heard and determined by a different Court. He also cited Article 50 of the *Constitution* and also the case of *Barnaba Kipsongok Tenai v Republic* (2014) eKLR which, he submitted, extensively discussed the principles governing recusal and transfer of a criminal trial from one court to another. He also cited Article 165 of the *Constitution*.

Court attendance on 8/12/2023

8. When the matter came up before me on 8/12/2023, I confirmed that the Applicant's Submissions filed on 11/10/2023 was on record.

9. On the part of the State-Respondent, neither a Response to the Application nor written Submissions had been filed. However, Learned Prosecution Counsel, Ms. Okok, appearing for the State, orally conceded to prayers 3, 4 and 5 of the Application (relating to lifting of the warrants of arrest) since according to her, she had confirmed that indeed, there was a valid order of stay in place issued by the High Court. She however stated that she was opposed to prayer 6 (recusal of the Learned Magistrate). Accordingly, I granted the said prayer 3, 4 and 5 and lifted the Warrants of Arrest.

10. Upon Ms. Okok's request, I allowed her to respond orally on the issue of recusal of the trial Magistrate.

11. In her oral Submissions, Ms. Okok submitted that the prayer for recusal lacked merit since it ought to have been made before the trial Court. She cited the case of *Gem Investments Limited v Prafulchandra Raja* (2022) eKLR and urged this Court to disallow the prayer.

12. In his brief oral reply, Counsel for the Applicant, Mr. Nabasenge, basically reiterated the matters already set out to in the Applicant's Supporting Affidavit and Submissions. He again faulted the Magistrate for bad faith, partiality and bias and reiterated that the High Court has power to re-allocate the Magistrate. He submitted further that he did not raise the issue of recusal before the trial Magistrate because they were already before the High Court for the other prayers and it would not have therefore made sense "to split" the prayers. Regarding the case of *Gem Investments Limited v Prafulchandra*

Raja cited by Ms. Okok, Mr. Nabasenge distinguished the authority by submitting that the same is inapplicable herein since it was a decision of a Judge of the High Court on an Application seeking recusal of a fellow Judge, not a Magistrate of a subordinate Court as is the case herein.

Analysis & Determination

13. With the prayers seeking lifting of the Warrants of Arrest having been conceded to and granted, the same are now out of the way. The issue now remaining is: "whether this Court should order for recusal of the trial Magistrate from the ongoing criminal case trial".

14. Discussing recusal, the Supreme Court, in *Jasbir Singh Raj & 3 others v Tarlochan Singh Rai & 4 Others* (2013) eKLR expressed itself as follows:

> "(6) 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*, 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.
>
> (8) It is an insightful perception in the common law tradition, that the justice of a case does not always rest on the straight lines cut by statutory prescriptions, and the judicial discretion in its delicate form, is critical to equitable outcomes. This is what Sir David Maxwell Fyfe meant when he attributed to Lord Atkin a "constructive intuition which operates after learning and analysis are exhausted" [in G. Lewis, Lord Atkin (London: Butterworths, 1983), p. 166]. It is precisely such delicate elements of judicial fairness that will also feature in the judgment as to whether or not the recusal of a Judge, particularly in the case of a collegiate Bench, is of any materiality, in a given case."

15. Regarding jurisdiction, this Court has supervisory role over Subordinate Courts by virtue of the provisions of Article 165(6) and (7) of the *Constitution* which provides as follows:

> "6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
>
> (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

16. Section 362 of the *Criminal Procedure Code*, then provides as follows:

> " Revision
>
> 362. Power of High Court to call for records
>
> The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."

17. There is also Section 81(1) of the *Criminal Procedure Code* which provides as follows:

> " 81. Power of High Court to change venue
>
> (1) Whenever it is made to appear to the High Court—
>
> (a) that a fair and impartial trial cannot be had in any criminal court subordinate thereto; or
>
> (b) that some question of law of unusual difficulty is likely to arise; or
>
> (c) that a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the offence; or
>
> (d) that an order under this section will tend to the general convenience of the parties or witnesses; or
>
> (e) that such an order is expedient for the ends of justice or is required by any provision of this *Code*,it may order—
>
> i. that an offence be tried by a court not empowered under the preceding sections of this Part but in other respects competent to try the offence;
>
> ii. that a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction;
>
> iii. that an accused person be committed for trial to itself.
>
> (2) The High Court may act on the report of the lower court, or on the application of a party interested, or on its own initiative."

18. I have no doubt in my mind that by virtue of the said provisions, and also on the basis of its inherent powers, this Court has the mandate, where sufficient grounds are demonstrated, to re-allocate a case before the subordinate Court from one Magistrate to another.

19. Regarding Section 81(1) of the *Criminal Procedure Code*, although one may justifiably argue that it only relates to "change of venue", as opposed to change of the "judicial officer" himself, I choose to read the provision broadly and interpret it to include even the latter.

20. In this instant case however, the application for recusal has been filed before this High Court and was never raised before the trial Magistrate whose recusal is the one sought. The question that arises is; "whether side-stepping the trial Magistrate or circumventing the trial Court and instead' instituting the Application before the High Court under its supervisory jurisdiction is a correct procedure".

21. In the case of *Republic v Michael Koskei* [2022] eKLR, Hon. Justice E. Ogola was faced with a similar scenario in which, as herein, he was dealing with an Application filed before the High Court seeking an order to be issued for recusal of the Senior Principal Magistrate at Iten from handling an ongoing criminal trial before the Magistrate's Court. As herein, the Application or issue of recusal had also not been raised before the Magistrate's Court. In dismissing the Application on, inter alia, the ground that the Application should have first been raised before the same trial Magistrate whose recusal was being sought, the Judge expressed himself as follows:

> " 15. And just in case there is still some doubt in this matter; good and acceptable practice the world over, and indeed the emerging practice in Kenya, is that where a party seeks the recusal of a Judge from a matter, the party would ask for the mention of the matter in the chambers, where the party would outlay his or her grievances, or suspicion and in which forum the Judge would be aware of possible application for his or her refusal. If indeed it is true that the honourable learned magistrate uttered some of the things alleged; and if the utterings were in court, nothing stopped the applicant from instantly objecting and publicly by his action creating a record for the same in the proceedings. All parties including the respondent, would be aware of such instant objection even if the trial court were to fail to record it. However, if the alleged utterings were made away from the court proceedings, and the appellant became aware of them, the appellant ought to have brought the knowledge of the same before the honourable trial magistrate for his comments. In this matter, it is clear that none of the two scenarios took place. In fact, record shows that on 13th January 2021, the matter came up for further defence hearing but the same was adjourned as Mr. Momanyi was absent. A new hearing date being 18/1/2021 was given. However, on that day, instead of proceeding with the hearing the appellant fished out the application for the recusal of the learned trial magistrate. This was an action is utmost bad faith."

22. I fully associate myself with the logic in the above case and find it as properly pronouncing the orderly manner in which Applications for recusal should be brought.

23. As already stated above, the term "recusal" is defined in the *Black's Law Dictionary*, 8th ed. (2004) [p.1303] in the following terms:

> " Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest." [emphasis mine]

24. It is therefore evident that "recusal" refers to a personal decision after personal soul-searching. The definition above confirms that the term refers to a decision by a judicial officer made by himself. It cannot be still called "recusal" if the decision is made by a third party. It is upon Appeal or a reference to a higher Court that a third party Judge may make the decision. It is for this reason that an application for recusal must in the first instance be made before the same judicial officer whose recusal is being sought.

25. The Applicants' Counsel's explanation for seeking recusal of the Magistrate before this Court without first seeking the same before the trial Court is that it would not have made sense to "split" the prayers because he already had a composite Application before the High Court and which contained other prayers in an omnibus matter. I do not believe this is a sufficient ground to circumvent the good practice and procedure set out by Ogola J in the case of *Republic v Michael Koskei* (*supra*).

26. Similarly, in the case of *Joseph Odhiambo Omondi v Republic* [2017] eKLR, Mrima J stated as follows:

> " 10. ..... Applications in the nature of recusal of a court must not be taken lightly. Such an application must be made before the presiding court in the first instance. Even before a party rushes to complain before the High Court that a trial court ought to recuse itself or that no documents were offered, there must at least be an effort to raise such matters first with the trial court. That court is bound by and is always called upon to uphold the Constitution and must deal with the issue once raised."

27. It is clear that even in the case of *Barnaba Kipsongok Tenai v Republic* (2014) eKLR which the Applicant has relied on and in which Ngenye-Macharia J (as she then was) re-allocated a criminal trial from one Magistrate to another on the ground that a perception of bias may arise against the Magistrate, the initial prayer for recusal was in the first instance made before the same trial Magistrate who declined to recuse herself. Only then did the successfully Applicant move to the High Court with a Miscellaneous Application.

28. Whereas this Court has supervisory jurisdiction over the trial Court, the same is not to be exercised in an arbitrary manner and/or in contravention of accepted principles. Removal of a Judge or Magistrate from hearing a case is not a trivial issue as it casts aspersions on the impartiality of the Court as a whole.

29. I reiterate that where a recusal of a trial magistrate has been sought, the acceptable practice is that the Applicant ought to begin by first placing the application at the doorstep of the trial Court before proceeding to the superior Court. In the premises, it is premature for this Court to interfere at this juncture. The Applicant's first port of call is before the same judicial officer against whom he seeks recusal from the matter. Only if the Application is declined can he call on this Court to invoke its supervisory jurisdiction.

30. In view of the foregoing, to avoid pre-judging or prejudicing any Application for recusal that may be filed before the trial Magistrate, I decline to determine, or make any comments, on the merits of the present Application.

Final Orders

31. The upshot of my findings above is that the Application dated 14/06/2023 succeeds partially and only to the following extent:

    i. The State-Respondent having conceded to prayers 3,4 and 5 of the Application, the order given by Hon. Richard O. Odenyo, Senior Principal Magistrate, on 13th June 2023 in Eldoret Chief

Magistrate's Court Criminal Case No. 1173 of 2020; *Republic v. Hillary Kipkosgei Kiboinet* which order issued warrants of arrest against the Applicant for failing to attend Court is hereby reviewed and uplifted and the bond terms earlier granted to the Applicant are reinstated.

ii. Prayer No. 6 of the said Application, seeking orders that this Court directs the said Learned Magistrate to recuse himself from conducting and hearing the said Eldoret Chief Magistrate's Court Criminal Case No. 1173 of 2020 and for re-allocation of the matter to a different magistrate is found to have been prematurely brought before the High Court and is declined at this stage.

iii. There shall be no order on costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 22ND DAY OF MARCH 2024

WANANDA J.R. ANURO

JUDGE