REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

CRIMINAL REVISION NO. E003 OF 2024

DIRECTOR OF PUBLIC PROSECUTIONS .....APPLICANT

VERSUS

CHARLES KIPROTICH TANUI.....1ST RESPONDENT

ELIAS MAINA KARUMI.....2ND RESPONDENT

JOSEPHAT KIPROTICH SIRMA.....3RD RESPONDENT

RULING

1. The Respondents CHARLES KIPROTICH TANUI, ELIAS MAINA KARUMI and JOSEPHAT KIPROTICH SIRMA are accused persons in NAIROBI CM'S COURT ANTI-CORRUPTION CASE NO. 17 OF 2020 (as the 1st Accused, the 2nd Accused and 3rd Accused, respectively). In that case they are facing various corruption offences relating to procurement processes at Kenya Pipeline Company where they were officers.
2. This matter is a Criminal Revision Application arising from a ruling by Hon Dr V. Wakumile (Senior Principal Magistrate) declining an Application made by the Director of Public Prosecutions (DPP) to withdraw charges against the Respondents. The withdrawal Application had been made under Section 87 (a) of the Criminal Procedure Code (Cap 75 Laws of Kenya).
3. In rejecting the DPP's said Application, the learned trial magistrate stated that the case having been in court for almost four years, it should run its full course so that it is resolved conclusively. Further that whereas the DPP has in the exercise of

his prosecutorial powers a wide latitude, those powers must be exercised in a manner that takes into account, the public interest.

4. Notably, out of the 26 prosecution witnesses listed in the case, 26 of them had already testified, and only one witness was remaining - the Investigating Officer from the Ethics and Anti-Corruption Commission (EACC). Who was at the time in the already in the witness stand ready to commence his testimony and conclude the prosecution's case.
5. Aggrieved by that a ruling, the DPP vide this miscellaneous cause sought revision of the said ruling. The same was by way of a Notice of Motion dated 20th February 2024. The revision was sought pursuant to Article 165 (6) & (7) of the Kenya Constitution 2010 as well as Section 362 & 364 of the Criminal Procedure Code. By that revision Application DPP has sought that the impugned ruling of the learned trial magistrate be set aside, and substituted with an order allowing the withdrawal.
6. When that revision Application came up before Hon Lady Justice Esther Maina on 20th February 2024 for directions, Mr Muteti a Senior Prosecution Counsel in the Office of the DPP, in his oral address to the learned judge, stated that the DPP was strenuously opposed to the Application being heard by me. He said the reason was that I have previously dismissed a similar revision Application arising from the same criminal case.
7. He further submitted that I had by the said dismissal affirmed the said learned trial magistrate's previous ruling that had rejected a similar Application for withdraw under Section 87 (a), of charges against the 3rd Respondent who is the 3rd accused in the criminal case. Further stated the DPP would like the revision to be referred

to the Chief Justice for empaneling of an expanded bench of judges to hear it.

8. The learned Judge declined the request for my exclusion from hearing the said revision; stating that since I had previously dealt with a related Application from the same criminal case, the file will be placed before me on 14th March 2024, for me to myself decide whether I will hear the matter or not.
9. Mr Muteti was emphatic that the revision be heard by a judge other than me, for reason that they were uncomfortable with me hearing it. At the time they had not filed a formal Application for my recusal, but nevertheless informally orally and tearily begged the learned judge to allocate the Application to another judge.
10. On 14th March 2024 when the matter came up before me, Mr Muteti stated that after the last court session, they had subsequently filed two additional formal Applications; one seeking my recusal, and the other seeking the empaneling of an expanded bench to hear the revision. The Applications were Notices of Motion both dated 4th March 2023.
11. Upon perusing the file, I directed that these latter two Applications be determined first; and that they be heard orally on an urgency basis. The same were argued orally yesterday 20th March 2024. With the 3rd Respondent (JOSPHAT KIPKOECH SIRMA) supporting, the 2nd Respondent (ELIAS MAINA KARUMI) opposing, and the 1st Respondent (CHARLES KIPROTICH TANUI) abstaining from taking a position. In opposing the Applications, 2nd Respondent's Advocate submitted that they had failed to meet the legal thresholds for judicial recusal and empanelment of an expanded bench, respectively. That the DPP was merely forum-

shopping for a judge that they hope would be sympathetic to them and give a favourable decision on that revision.

Ruling on the Recusal Application

12. There are two issues for determination in this Application, namely:
    (a) *Whether this Application has met the legal threshold for judicial recusal.*
    (b) *Whether I should recuse myself from this matter as proffered by the DPP in this application, or what orders I should make.*
13. Judicial recusal is the withdrawal of a judicial officer from on-going proceedings, for reason of a conflict of interest, bias, or lack of impartiality. It cannot be on the basis of a litigant's mere displeasure, whim, or unfounded apprehension. This is because the bedrock of this determination rests on the test that a recusal is necessitated where it is proved beyond peradventure, speculation, conjecture, and sheer paranoia, that a judicial officer will not impartially handle a case before him, as a result of actual bias or apprehension of bias.
14. Where the Application is based on apprehension rather than actual bias, the apprehension should be that of a reasonable person and must be assessed in the light of the true facts as they emerge at the hearing of the application; and the test to weigh the apprehension should be an objective one, and not a subjective one based for instance, on mere paranoia. In other words, the apprehension should not be such as is unfounded or unreasonable.
15. Where the plea for recusal is based apprehension such as in this Application, the apprehension must be reasonable, honest,

logical and objective; and must be based on solid facts. For instance, if it is demonstrated that he is related to any of the parties in the proceedings, or he has other personal interest.

16. The Supreme Court of Uganda in Uganda Polybags Ltd v. Development Finance Company Ltd & Others [1999] 2 EA 337 was of the view that **litigants have no right to choose which judicial officers should hear and determine their cases, since all judicial officers take oath to administer justice to all manner of people impartially, and without fear, favour, affection or ill will, and the oath must be respected**. Here at home, our Court of Appeal in Uhuru Highway Development Ltd v. Central Bank of Kenya & 2 Others Civil Appeal No. 36 of 1996 stated as follows:

> ***"Except where a person acting in a judicial capacity had a pecuniary interest in the outcome of the proceedings, when the Court would assume bias and automatically disqualify him from adjudication, the test applied in all cases of apparent bias was whether having regard to the relevant circumstances, there was a real danger of bias on the relevant member of the tribunal in question, in the sense that he might unfairly regard or unfairly regarded with favour or disfavour the case of a party to issue under consideration by him: the real test is in terms of real danger rather than real likelihood to ensure that the Court is thinking in terms of possibility rather than probability of bias...***
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> ***"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duties to sit and do not, by acceding too readily to the suggestions of appearance of bias, encourage parties to***

believe that by seeking the disqualification of a Judge, they will have their cases tried by someone thought to be more likely to decide the case in their favour....

"Although most litigants would much prefer that they be allowed to shop around for judges that would hear their cases, that is a luxury which is not yet available under our law to litigants."

17. I dare say that this Application is among its other intentions, a forum shopping scheme that should not find glorification of whatever colour. The Court of Appeal in Galaxy Paints Company Limited v. Falcon Guards Limited [1999] eKLR, stated as follows:

"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge 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 disqualification of a Judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

18. Many a litigant still believe, and mistakenly so, that an unfounded apprehension of bias could form a justifiable basis for recusal. Nothing can be further from the truth. For allegations of bias to necessitate a recusal, the bias must be real or reasonably apprehensible, and not speculative, by conjecture, or merely imagined.

19. Recusal is not merely the litigants' tool for dislodging judicial officers from proceedings, but a tool that judicial officers can themselves harness to advance the rule of law as well as the dictates of natural justice and fair play. A judicial officer presiding in a case will have no difficulty recusing himself where he knows

or it is sufficiently demonstrated, that he is biased, likely to be biased, or unlikely to be impartial.

20. Recusal Applications by litigants ought to be used by them as a shield for safeguarding the administration of justice as well as the integrity of the judiciary, and not as a sword for attacking Judges. It should never be for merely expressing a litigant's displeasure at a judge or satisfying the litigant's ego; but an instrument for enhancing honour and dignity of judicial office.

21. Recusal Applications therefore, such as should be made in good faith, and with much circumspection, compassion, honesty and truthfulness; as once made, it is to be subjected to a strict and higher legal threshold. Hence it is not a low-lying fruit. Unfortunately, some litigants believe that the moment they apply for recusal, the judge should panickily just cave in and recuse without interrogating the grounds advanced for his proposed recusal.

22. The extravagantly devious and mischievous dispatch of judicial recusal will be the death bed of the authority and dignity of judiciaries. Unless hard-tackled, recusal Applications can at times be exploited by some parties for hidden litigation gains. Such as stealing the match from the court, unevening the playing field to the disadvantage of their adversaries, upstaging them, or removing them from the seat of justice.

23. Just as a feeble, vulnerable, terrified and intimidated judiciary is unhealthy for law and the administration of justice, nascent democracies such as Kenya's require a strong, vibrant, assertive and independent judiciary. A dignified and venerable judiciary is indeed to be preferred. This is because world over, the judiciary is the vanguard of justice, a temple of law, and the last line of

defence for rights and fundamental freedoms guaranteed by Constitutions. Notably, a threat on judges and their independence, is a threat on the Constitution, the rule of law, and the administration of Justice.

24. Needless to say, recusal should not be used by litigants for intimidation, insubordination, blackmail, arm-twisting, capture, or the boxing of a Judge into conforming with a litigant's whims; or for throwing him into panic, subservience or dishonor. Such ulterior motives if allowed have the undesirable consequence of chipping away on the authority, dignity, integrity and independence of courts.

25. This is because, recusal applications are applications *in personam* rather than *in rem*. In that they are made against the person of the judicial officer, rather than the subject matter of the suit. Besides, whenever they are made, all the proceedings in the suit will usually be paused, to await the determination on recusal, before they can resume.

Can a Judge's Previous Ruling or Judgment Be a Ground for a Recusal?

26. The DPP's agitation for my recusal is that having scrutinized my previous ruling(s) and my supposed stand on the proper exercise of prosecutorial powers under Article 157 of the Constitution as well as withdrawal/termination of cases under Section 87 (a) of the Criminal Procedure Code, he believes that he knows how my ruling on the revision Application he has filed in this matter will be; and that he does not want such a decision. That therefore I should recuse myself from hearing the Application as my decision will be as predicted by him.

27. My response to this is that apart from this reasoning being without any jurisprudential basis or honest legal anchor, a judge is neither shackled to nor bound by his previous decisions even on identical facts. It is therefore incumbent upon any litigant prosecuting a similar matter before the judge to persuasively present to the judge in the subsequent matter legally sound enough arguments that will persuade him to decide differently.
28. Such a party should at the hearing of the subsequent matter, skillfully and persuasively persuade the judge to take a contrary or different position. A party should not cite a previous as a ground for urging the judge's recusal. Judicial determination once pronounced should be presumed to have been made in good faith to meet the ends of justice in the case. Therefore no person or entity should be permitted to use a judge's ruling or judgment to intimidate, blackmail, or victimize the judge; or use a judge's previous ruling or judgment, to debar him from handling similar matters. That will be judicial hypocrisy or judicial capture.
29. Any litigant dissatisfied with a judge's ruling or judgment, has the option of either living with it, or appealing to a higher court. But not to insist that the judge should in the remainder his of his judicial career never handle similar cases. It is such banishment that the DPP has attempted in these two Application. That to me is not only an absurdity, but is also oppressive and an affront to judicial function. I liken my situation in this Application, to a situation in soccer, where some team after losing the march, has resorted to beating up the referee,
30. Granting this wish will spell doom for the judicature and will be a death knell for judicial independence and judicial integrity. Prosecutors unlike ordinary litigants are also advocates of this

Court and therefore its officers. Hence they need to appreciate the need to jealously protect the independence of the judiciary.

31. A judge in exercise judicial function should decide cases without the fear of victimisation, lynching, crucifixion, or persecution of whatsoever kind. The stance attempted by the ODPP in this matter has the danger of eroding the progressive gains made so far, for the judicature under the 2010 Kenya Constitution.

32. Which Constitution, all of us in our individual and diverse capacities, collectively and unreservedly owe allegiance to. This is space that the judiciary and indeed all Kenyans should ring-fence and jealously guard. On this the ODPP has clearly hit a miss. What it should have pursue is a change of the law, and not pursuing a change of the judge. The legal threshold for an order for empanelment of an expanded bench of more than one judge is a constitutional one that is spelt out on the Constitution itself, Article 165 (4), rather than legislation, common sense, or mere judicial practice.

Ruling on the Application for an Expanded Bench of Judges

33. The empanelment of expanded benches of judges to hear matters, has been provisioned in the Constitution itself. In Article 165 (4) of the Constitution. The Constitution being the supreme law of the land, this provisioning has placed this issue on a higher pedestal, and on high ground.

34. The framers of the Constitution by so doing put the issue beyond the ordinary litigational wishes, aspirations and schemes of litigants. This has put it beyond sheer common sense, beyond pre-adventure, beyond mischief and abuse of court process, and beyond the mere balancing of equities, and even convenience.

35. One of the biggest nightmares in Kenya's judicial processes is the problem of case backlog. To address this problem, the judiciary must ensure only the expeditious disposal of cases matters, but also the rational use of the valuable but scarce judicial time as well as judicial resources such as personnel. Given their acute shortage, this also requires optimal and rational utilization of the few judges that we have.

36. Rationality dictates that we should deploy the empaneling of expanded benches very spairingly, and in deserving cases only. Particularly those that involve complex issues or those that are of jurisprudential moment, and general importance. Not generously and in ordinary, straight-jacket and straight-forward matters such as an Application for criminal revision.

37. This is because in a criminal revision, this Court is merely to examine the record of the trial court and determine there is any incorrectness, illegality, irregularity or impropriety. Regarding the impugned decision of the magistrate and which is the subject of the DPP's revision Application, the court is required to examine the original record of the trial court including the impugned said ruling, and satisfy itself as to its correctness, legality, regularity, and propriety.

38. This is to be done pursuant to the Court's supervisory jurisdiction in Article 165 (6) and (7) of the Constitution, as well as its revisionary jurisdiction in Section 362, 364 and 365 of the Criminal Procedure Code. This is neither rocket science, philosophical enquiry nor complex legal determination. It is a straight-forward legal examination for manifest errors that appear on the face of the record.

39. Being manifest errors, they are expected to be apparent on the face of the record, with just a pair of eyes. This neither requires extra pairs of eye or extra minds or additional wisdom. Honestly, a revision Application is will, honestly ill require additional pairs of eyes or additional minds and wisdom not posed by a single judge.
40. A revision entails a plain examination of the record, rather than a complex jurisprudential analysis, philosophical enquiry or socratic discourse. analysis. A grievant clamouring for that, must do so by way of appeal and not revision. Afterall a revision, like a judicial review interrogates the process and technical aspects, and not the merits of the decision or action.
41. That is why the Criminal Procedure Code in Section 365 gives a revisioning court, discretion to decide whether to just examine the record by itself and decide or hear the parties. As I stated in Nairobi High Court Anti-corruption Criminal Revision No. E005 of 2023 Republic v. Kioko Mike Sonko Mbuvi & Others:

> **"The court may in exercising its revisionary power on its own motion without any complaint or prompting from any party or anyone and its supervisory role on its own motion call for the record of any subordinate court and examine it as to its correctness, regularity, legality, or propriety."**

42. The DPP has failed to advance in this Application the constitutionally prescribed grounding or place before this Court such material as would warrant the empanelment of an expanded bench of judges to hear and deliberate a straight-jacket matter in the nature of its pending revision Application.

The Final Orders.

43. For reasons already explained in this Ruling, the DPP's two Applications dated 4th March 2024 (the one for my recusal and

the one for empanelment of an expanded bench of judges for the pending revision Application), are hereby dismissed. I will shortly hereafter issue directions for the expeditious disposal of said Application.

DATED and DELIVERED at NAIROBI Virtually this 21st Day of March 2024.

PROF NIXON SIFUNA

JUDGE