

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF  
TANZANIA AT TABORA**

**SITTING AT NZEGA**

CRIMINAL SESSION CASE NO. 6 OF 2020

**THE REPUBLIC**

**VERSUS**

**1. SAFARI S/O ANTONY @ MTELEMKO**

**2. SAFARI S/O KIJA @ ELIKANA**

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**RULING**  
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*Date of Submission: 11/3/2022*

*Date of Delivery: 14/3/2022*

**AMOUR S. KHAMIS, J.**

At the commencement of trial, the defence counsel, Mr. Fadhil Kingu and Mr. Saleh Makunga, alerted this Court that the accused had a concern to address the Court.

Despite of being represented by learned advocates, I allowed the two accused persons to address the Court for the interest of justice.

In the oral submissions, the accused persons sought for the recusal of the presiding Judge from any further conduct of the hearing and the case be re-assigned to another Judge.

The accused's first ground for recusal is that in June last year, the presiding Judge sat in P.I Case No. 3/2020 involving similar accused persons and they were convicted.

They contended that since the learned Judge presided over a case in which they were sentenced to suffer death by hanging, it was likely that a similar conclusion will be arrived at in this case as both matters are murder accusations.

The accused further contended that from the nature of the present case, witnesses who testified in P.I No. 3/2020 are likely to appear and similar exhibits will be tendered.

In such circumstances, the two accused felt that they will not get a fair justice where the judge and the witnesses are the same.

The two accused submitted that I should recuse myself from the conduct of the case and the case be re-assigned to a Judge who did not handle their previous case.

The prosecution team composed of Ms. Jane Mandago, learned Senior State Attorney and Mr. Peter Utafu, learned State Attorney, opposed the application.

Mr. Peter Utafu strongly contended that the Judge is duty bound not to recuse himself from the conduct of the case without valid reasons.

He submitted that the accused were bound to conclusively establish and demonstrate the propriety of a prayer for seeking recusal of which must be weighed by the Court.

Mr. Utafu asserted that the accused should not be allowed to justify their prayer simply because the learned judge presided over their previous case and found a conviction.

The learned State Attorney argued that the proceedings in P.I No. 3/2020 are separate and distinct from these proceedings originating from P.I No. 6/2020 in so far as they involve separate deceased persons who suffered death at two different scenes and at a time range of about sixty (60) days.

He submitted that the fact that the learned Judge entered judgment and convicted the accused in the previous case was not a strong reason to justify his recusal from these proceedings.

Mr. Utafu asserted that the findings in the judgement of this Court in P1 No. 3/2020 were specific to the facts, circumstances and principles of law applicable in that case and that the reasoning therein cannot and should not be adopted in this case.

In sum, the prosecution asserted that the evidence, witnesses, scenes, facts, and reasons applicable in the previous case have no nexus and will not have an impact on the determination of the present case.

In support of the position, Mr. Utafu cited the Court of Appeal decision in **ISACK MWAMAKULA AND 2 OTHERS VS. CRDB BANK LTD, CIVIL REVISION NO. 6/2016** which cited with approval its earlier decision in **LAUREAN G. RUGAIMUKAMU VS. INSPECTOR GENERAL OF POLICE AND ANOTHER, CIVIL APPEAL NO. 13/1999** in which the Court of Appeal held that a judge or magistrate should not be argued to disqualify him/herself for flimsy or imaginary fear.

Further, Mr. Utafu drew my attention to the Kenyan case of **NYAMONDI OCHIENG NYAMOLO AND ANOTHER VS. KENYA POSTS AND TELECOMMUNICATION CORPORATION, CIVIL APPLICATION NO. 264/1993** (Unreported).

Founded on the Kenyan Case of **NYAMODI OCHIENG NYAMOGO** (supra), the learned State Attorney submitted that the accused should not be allowed to shop around for judges that would hear their cases because that is a luxury that our criminal justice cannot afford.

The main issue is whether I should recuse myself from the conduct of this case or any other matter involving the two accused persons.

The principles regulating the recusal of judges and magistrates in our jurisdiction are well set.

In the case of the **REGISTERED TRUSTEES OF SOCIAL ACTION FUND AND ANOTHER VS. HAPPY SAUSAGES LTD AND OTHERS (2004) TLR 204**, the Court of Appeal held that: -

*“It would be an abduction of judicial function and encouragement of spurious applications for a judicial officer to adopt the approach that he/she should disqualify himself/herself whenever requested to do so on the application of one of the parties on the grounds of the possible appearance of bias ... the test for apparent bias is whether the alleged circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the Court was biased...”*

In the English case of **R VS GOUGH (1993) ALLER 724** cited in the case of **ALI SULEIMAN MUSA and ANOTHER VS RAFAAT SHERALI CHAMPS, CIVIL APPEAL NO. 97/2011(CAT - Unreported)**, it was held that

*“Whether, having regard to the relevant circumstances, there was real danger of bias on the relevant member of the tribunal in question, in the sense that he might unfairly regard or have unfairly regarded with favour or disfavour the case of a party to the issue under consideration by him... for the avoidance of doubt, ... the test is in terms of real danger rather than real likelihood to ensure that the Court is thinking in terms of possibility rather than the probability of bias...”*

In the case of **LAUREAN RUGAIMUKAMU INSPECTOR VS INSPECTOR GENERAL OF POLICE AND ATTORNEY GENERAL, CIVIL APPEAL NO. 13 OF 1999** (unreported) the Court of Appeal laid down three circumstances under which an objection against a judge or magistrate can legitimately be raised. These are: -

*“One, if there is evidence of bad blood between the litigant and the judge concerned. Two, if the judge has close relationship with the adversary party or one of them. Three, if the judge or a member of his close family has an interest in the outcome of the litigation, other than the administration of justice...”*

In **ISACK MWAMASIKA AND 2 OTHERS VS. CRDB BANK LTD, CIVIL REVISION NO. 6/2016**, (unreported) the Court of Appeal at PP 14 held that: -

*“What we have gathered from the authorities cited herein above seems to direct that judge are required to resist the temptation to disqualify themselves for flimsy or imaginary fears...”*

In **KHALID MWISONGO VS M/S UNITRANS (T) LTD, MISC. APPLICATION NO. 298 OF 2016** (unreported) this Court (Labour Division) pointed out that recusal and disqualification of judges is a sensitive subject that should be handled with careful consideration.

The principles cited above strengthen the standards of conduct contained in the **CODE OF CONDUCT FOR JUDICIAL OFFICERS** in Tanzania which were also referred to in the case of **MWITA CHACHA AND 4 OTHERS VS REPUBLIC, CRIMINAL APPEAL, NO. 1/2007** (unreported) whereupon the Court of Appeal pointed that:-

*“We wish to emphatically state that judicial officers should not of the flimsiest of pretexts disqualify themselves from hearing cases. This will cause an unnecessary added burden to other judicial officers to whom the cases will subsequently be re-assigned. It will cause unwarranted delay in the disposal of the case at hand and will also generally add financial cost of the trial of the case”*

In the present case, the first ground for the prayer of recusal is that I presided over P. I NO. 3/2020 and convicted the two accused for the offence of murder.

Whereas it is not disputed that I sat in P.I No. 3/2020 wherein the same accused persons were tried and convicted for

murder, nonetheless, that case is separate and distinct from the present case (P.I No. 6/2020) which has a completely new set of facts, and any party dissatisfied with the previous decision was entitled to an appeal to the Court of Appeal.

I am also of the firm view that a mere fact that I convicted the accused in the previous case was not an automatic wagon for recusal. The way I see it, it would be incautious to justify my decision on the ground that I previously convicted the accused for murder in respect of a different deceased, killed in a different scene with a span of sixty (60) days between the two incidents.

I have also considered on whether a person having knowledge of the facts of the case in P.I No. 3/2020 and P.I No 6/2020 (the present case) would reach a conclusion that I am biased.

After a careful consideration, I am convinced that the answer will be no. This case as it was for the previous one cannot be decided before parties present their respective evidence and arguments, and if any of them is dissatisfied, he/she is entitled to an appeal.

At this juncture, I am honoured to take on board the decision of the High Court of Kenya in **REPUBLIC VS INDEPENDENT ELECTORAL BOUNDARIES COMMISSION AND ANOTHER EXPARTE COALITION FOR REFORMS AND DEMOCRACY (CORD), HC NRB, MISC. APPLICATION NO. 648 OF 2016 (2017) EKLK**, thus: -

*"To seek the recusal of a judge from hearing a matter simply on the ground that he has determined a matter with similar facts is an implication that there is a likelihood that another*

*judge will arrive at a different decision. In my view, instead of subjecting another judge of concurrent jurisdiction to an embarrassing situation of arriving at a different decision, parties ought to be advised by their legal counsel to appeal the decision instead and the law provides for mechanism for protection of a party while it is pursuing an appeal. By asking another judge to hear the matter, based on recusal there would be an expectation that the other judge may arrive at a decision arrived different from the decision arrived at ... Whereas a judge of the High Court is not bound by a decision of a court of concurrent jurisdiction, to deliberately set out to have another judge arrive at a different decision is in my view a manifestation of bad faith. If the matter were to be heard by a different judge of concurrent jurisdiction and a different decision of the Court is arrived at there would be two conflicting decisions of the Court and the perception created would be that the respondent chose a judge who was sympathetic to its cause..."*

Whereas the facts in the present case are different from those obtained in P.I No. 3/2020, the deceased persons are unrelated, the scenes of crime are non-identical and the incidents took place in a range of sixty (60) days from each other. Further the exhibits to be tendered and some of the witnesses are unlike.

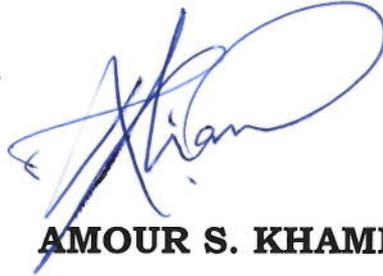
In such circumstances, the accused's' prayers are meant to shop- around for a judge of their choice that could arrive at a decision favourable to them. This attitude implies that they are



not acting in good faith. I therefore find that the two accused failed to advance sufficient grounds for recusal and as such, I refuse to recuse myself.

The prayer for recusal is thus dismissed and trial of the case to proceed on merits.

It is so ordered.



**AMOUR S. KHAMIS**

**JUDGE**

**14/3/2022**

**ORDER:**

Ruling delivered in open Court in presence of Mr. Fadhili Kingu, Advocate for the 1<sup>st</sup> accused and Mr. Salehe Makunga, advocate for 2<sup>nd</sup> Agccused and Ms. Jane Mandago Senior State Attorney for the Republic assisted with Mr. Peter Utafu, State Attorney.



**AMOUR S. KHAMIS**

**JUDGE**

**14/3/2022**