

TANZANIA / JUDGMENT

RULING JUMANNE MAHENDE

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IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA (IN THE SUB- REGISTRY OF
MWANZA) ORIGINAL JURISDICTION AT MWANZA CRIMINAL SESSIONS CASE NO. 05 OF 2023
THE REPUBLIC Versus JUMANNE S/O MAHENDE @ WANG'ANYI ACCUSED

RULING

2nd & 3rd May, 2024 CHUMA, J. On the 22nd day of April 2024, the office of the Deputy Registrar High Court of Tanzania Mwanza Sub-Registry received a letter dated 21/04/2024 signed by Aziza Sikalwanda and Dominatha Phillipo on behalf of their families requesting for my recusal as a presiding judge from the conduct of this matter. When the matter came before me for hearing on 2/5/2024 I invited the parties to address the court on this issue and had the following to submit. Kicking off the ball Ms. Marther Mwadenya SSA argued that, according to the complainant, the reasons for recusal is that this matter 1 was initially entertained by me on preliminary stages namely mention and committal proceedings in which the accused was committed to the High Court for trial. She went on to submit that though there is no sufficient ground to warrant recusal but the court should use its wisdom to determine the matter bearing in mind that justice should not only be done rather it should be seen to have been done. On rebuttal, Mr. Kibatala Learned advocate for the accused person vehemently opposed the application. He argued that the alleged committal proceedings are in respect of PI case No 19/2015 conducted on 14/12/2017 which resulted in Criminal Session No 131/2017. And that the decision in criminal session No 131/2017 was nullified by the court of appeal and ordered trial denoval. On 15/12/2022 the matter was withdrawn via Nolle Prosequere. However, later on, a new charge sheet was preferred against the accused resulting in Committal proceedings in PI No 21/2022 before Hon. Mgendi SRM. It was his further argument that what is before this court is criminal session case No. 5/2023 resulting from PI No. 21/2022. Hence it is a new case altogether. The interest of the claimant is represented by the Republic who previously argued that the said Nolle Prosequere did away 2 with all records of the referred committal proceedings inclusive. Now at the same time, they are arguing the same as if still exists. In the alternative, Mr. Kibatala went on submitting his arguments by referring this court to several authorities indicating principals for or against recusal. The very authorities are Golden Globe International Services and another V. Millicom (Tanzania)N.V. and another Civil Application No.195/01 of 2017, Amades S. Mkoba& 104 others V. Rose Costa Mwanache Misc. Civil Application No 38/2012, Khalid Mwisongo V.M/S Unitrans(T) LTD Misc Application No.298/2016, Faustine Shirima V. Irene Bernard Civil Revision No.03 of 2021and Issack Mwamasika and two

others V. CRDB Bank Limited, Civil Revision No 6/2016 on pages 6/7/10 - 15. According to Mr. Kibatala in all these cases it was insisted factors or circumstances to consider before a judge decides to recuse or not in conduct of the case. One is that there must be an evidence of bad blood between the litigant and the Judge concerned. Two if a judge has a close relationship with the adverse party or one of them. Third, 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. A judge or Magistrate 3 should not be asked to disqualify himself or herself for flimsy or imaginary fears. Mr. Kibatala Learned counsels insisted that recusal concern is not an issue of comfortability but rather a matter of law. He also cited the word of God in Colossians 3:8 to adhesive his submission which reads; "But now you also, put them all aside: anger, wrath, malice, slander, and abusive speech from your mouth". In Kiswahili version, the verse reads; "Lakini sasa ni lazima mwachane kabisa na mambo kama haya: hasira, ghadhabu, nia mbaya, matukano na maneno machafu kutoka vinywani mwenu". He finally invited this court to dismiss the raised concern for want of merit and proceed with hearing the matter. In her brief rejoinder, Ms Marther Mwadenya contended that, even if the case was withdrawn but the case facts, accused, and witnesses are the same and prayed the court invoke its wisdom to determine the matter. Having heard the rival submission of both parties in dispute, the nagging issue calling for determination by this Court is whether the concern for recusal of the trial judge is justified or not. Notably, the recusal and disqualification of a judge or any judicial officer from the 4 conduct of any matter is a delicate or sensitive concern, therefore any decision to raise a motion seeking his/her disqualification should be made after careful consideration of all the circumstances pertaining to such subject matter as it was held in the case of Issack Mwamasika and 2 others (supra) as argued by Mr. Kibatala Learned counsel. Rule 9 (1) and (2) of the Code of Conduct and Ethics for Judicial Officers, 2020, GN. No. 1001 published on 20/11/2020 provides for the circumstances under which a judicial officer may disqualify or refuse to disqualify himself from the conduct of the matter. The same reads thus: 9(1) A judicial officer shall disqualify himself in any case in which that judicial officer:

- (a) believes he will be unable to adjudicate impartially.
- (b) believes that a reasonable, fair-minded, and informed person, would have a reasonable suspicion of conflict between a judicial officer's personal interest or that of a judicial officer's immediate family and his judicial functions;
- (c) has a personal bias or prejudice concerning a party or personal knowledge or facts;
- (d) served as a lawyer in a matter in controversy or a lawyer with whom he previously practised law served during such association 5 as a lawyer concerning the matter or the judicial officer or such lawyer has been a material witness in the matter; Further Rule 2 C (1) of the Code of Conduct for Judicial Officers in our jurisdiction provides that a Judicial officer should disqualify himself in proceedings in which impartiality might reasonably be questionable. The reasonability test has not been defined in the referred code. But the same has been explained in several cases to mean that bias is determined where a fair-minded and an informed observer, having considered the relevant facts, would conclude that there was a

real possibility that the tribunal was biased. This position was explained in a number of cases including, Hong Cong LTD V.VIP Engineering and Marketing Ltd, Civil Application No.158&159 of 2011, Porter V.Magill [2001]UKHL67 on page 359. The reasons for recusal were restated by the Court of Appeal in the case of Isaac Mwamasika (supra) in which the apex court in its earlier decision in Laurean G. Rugaimukamu Vs. Inspector General of Police & Another, CAT-Civil Appeal No. 13 of 1999 (unreported), was quoted with approval. In the latter, principles for recusal were provided as follows; 6 “An objection against a judge or magistrate can legitimately be raised in the following circumstances: One if there is evidence of bad blood between the litigant and the judge concerned. Two, if the judge has a close relationship with the adversary party or one of them. Third, 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. A judge or a magistrate should not be asked to disqualify himself for flimsy or imaginary fears”. Further, the law is well settled that, recusal on trivial grounds is tantamount to abduction of judicial function. This principle of law was stated in the case of Registered Trustees of Social Action Trust Fund & Another Vs. Happy Sausages Ltd & Others (2004) TLR 264 where it was held inter alia that: “It is our considered view that it would be an abduction of the judicial function and an encouragement of spurious application for a judicial officer to adopt the approach that he/she should disqualify himself or herself whenever requested to do so on application of one of the parties on the grounds of possible appearance of bias”. Having in mind all those grounds and principles of law guiding the recusal of a judicial officer, and my close look into the reasons advanced by the complainant no doubt, as rightly submitted by Ms Marther 7 Mwadenya SSA for the Republic has no merit to warrant the trial judge to recurse from pertaining this matter. The reasons behind recusal are flimsy and do not fall within the above-prescribed principles or goes contrary to the reasons stated in the case of Laurian G. Rugaimukamu(supra). In Amadei Mkoba’s case(supra) My Learned brother Hon Twaibu J. dismissed the applicant’s prayer for his recusal from pertaining the application for leave to appeal against his decision on the main case. In the instant case, the alleged case is no longer in existence as the same was withdrawn under section 91(1) of CPA. In the present case, its committal was conducted by another Magistrate. But be that as it may, as a matter of argument assuming the proceedings still exist, the role of the lower court in murder cases is limited to mentioning and finally committing the accused to the High Court for trial. It has no jurisdiction even to take a plea of the accused person. I wonder how then a bias may stand in such circumstances if I will entertain the instant case. The practice indicates that even Judges who are vested with powers to entertain murder cases sometimes conduct plea and plea-taking and proceed to hear the case on its merit. I have asked myself can one ask a judge to disqualify himself in conducting a trial whose plea and plea-taking were conducted by the very judge? I don’t find any. The circumstance of 8 this matter in my view does not suggest that a prudent, fair-minded, and informed observer, having considered the relevant facts surrounding this case, would conclude that there is a likelihood of bias if I do not relinquish my duty to pertain to this matter. I therefore in agreement with Mr. Kibatala that the raised concern is barren of proof because the purported case pertained by the now-trial Judge does not exist. This is a

new case. But even if it could be the same still no justifiable reasons were ever adduced in support of their arguments. However, despite the existence of the highlighted principles of law, and that no tangible grounds ever given to justify the raised concern, each case has to be decided according to the circumstances surrounding it. Therefore, in the interest of justice, the wisdom of law and justice and human wisdom tells me to recuse myself from hearing this case. The accused will then wait for another session to be scheduled by the Deputy registrar. Dated at MWANZA this 3rd day of May 2024. W. M. CHUMA JUDGE 9 Ruling delivered before Ms Mwadenya SSA, Frank Nchanila, Jaines Kihwelo, Tabitha Zakayo State Attorney for the Republic and Mr Kibatala assisted by Grolia Ulomi Learned counsels for the accused person this 3rd May, 2024. W. M. CHUMA JUDGE 10

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