

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: CC 1/2018

In the matter between:

JACO KENNEDY

APPLICANT

and

INNOCENTIA MTHANDAZO NYONI

FIRST RESPONDENT

OLIVIA MARTHA IMALWA

SECOND RESPONDENT

RAY CLOETE

SECOND ACCUSED

Neutral citation: *Kennedy v Nyoni* (CC 1/2018) [2023] NAHCMD 253 (11 May 2023)

Coram: MILLER AJ

Heard: 14 April 2023

Delivered: 11 May 2023

Flynote: Application – recusal application – applicant seeks an order that the first respondent recuse herself as prosecutor on the ground of perception of bias and possibly being an essential witness in the criminal trial of the applicant – The court not satisfied that sufficient facts placed before court to find that the prosecutor is biased and not impartial.

Summary: This is an application, whereby the applicant seeks an order that the first respondent, Ms Nyoni, recuses herself as the prosecutor in the criminal matter

pending before the court, where the applicant is the accused. In the criminal matter, the applicant is charged with kidnapping, rape and attempting to defeat or obstruct the course of justice.

The applicant alleges a perceived perception of bias on the part of Ms Nyoni. The applicant further alleges that Ms Nyoni is an essential witness in relation to the charge of attempting to defeat or obstruct the course of justice. However, the State has indicated that Ms Nyoni will not be called as a witness although she is willing to testify.

Held that, the test for perceived belief or bias is an objective one. The applicant must place facts before court, which will establish that the prosecutor is not impartial.

Held that, the applicant has not placed sufficient facts before court to establish that Ms Nyoni is perceived bias or not impartial.

Held further that, the fact that Ms Nyoni is conceivably be a witness is insufficient to establish bias on her part. The application is therefore dismissed.

ORDER

The application is dismissed.

JUDGMENT

MILLER AJ:

[1] This judgment concerns an application brought by the applicant in which he seeks an order that the first respondent to whom I shall refer to as Ms Nyoni recuses herself from her role as the prosecutor in a criminal matter presently pending before me. The trial commenced some time ago and is presently partly heard.

[2] The application is opposed. I may add that the application and the opposition thereto suffered in some respects with procedural difficulties and non-compliance with the rules of court and with orders I had issued.

[3] In an effort to expedite the matter, I made various orders concerning non-compliance where necessary. In the result, the hearing of the application on its merits only proceeded on 14 April 2023. I reserved my judgment until today.

[4] In order to provide some context to the application it becomes necessary to provide some background. The following facts are relevant:

4.1 The applicant is cited as accused no. 1 in the criminal trial before me.

4.2 He is charged with a number of counts. They include charges of kidnapping, rape and attempting to defeat or obstruct the course of justice. Ms Nyoni appeared for the State throughout the proceedings thus far.

4.3 The present dispute has its origin in the allegations forming the basis of count 7. The charge reads as follows:

‘Attempting to defeat or obstruct the course of justice.

In that whereas the accused, Jaco Kennedy, was to be tried at the High Court at Windhoek on charges including rape in contravention of sections 2(1)(a) and 2(1)(b) of the Combating of Rape Act, 8 of 2000, and whereas Mary-Ann Caroline Groenawaldt was, to the knowledge of the said accused, to be a witness at the trial of the said accused, the said accused did on or about the year 2019 and at or near Windhoek in the district of Windhoek, unlawfully and with intent to defeat or obstruct the course of justice author a statement the import of which was that the complainant Mary-Ann Groenawaldt told a deceased investigator that the said accused did not rape her.

In the premises the said accused did commit the crime of attempting to defeat or obstruct the course of justice.’

4.4 The existence of the statement was initially raised by the applicant during the course of an affidavit filed in support of a bail application. The relevant passage from that affidavit reads as follows:

‘On Friday 19th January 2018 the Katutura public prosecutor Mr Arie Husselmann provided me in person with docket disclosure. I was unrepresented at the time. On my arrival back at prison I studied the docket content and noticed that the first complainant gave the police a written statement dated 4 February 2015 wherein she said that I did not rape her.’

4.5 The State has during the course of the trial led the evidence of various witnesses in an attempt to prove the contrary. This includes the evidence of Mr Husselman, Ms Nangoro, Ms van Zyl, Mr Olivier and Ms Gowases. The upshot of their evidence is that Mr Husselman did not provide any statement to the accused. Nor did he instruct anybody else to do so. The evidence seeks to establish that at all relevant time the police docket was in the possession of staff members at the Office of the Prosecutor-General, which will include Ms Nyoni. It follows, so the evidence goes, that Mr Husselman did not have possession of the docket, which he disclosed to the applicant. That issue is a factual dispute to be resolved with other disputes at the conclusion of the hearing.

[5] Counsel for the applicant submits that given the facts I mentioned, it is apparent that Ms Nyoni is an essential witness in the matter. That being the case, it brings into question her impartiality with the result that it renders the trial of the applicant unfair and in conflict with Article 12 of the Constitution. The applicant contends that there is a perceived perception of bias or partiality on the part of Ms Nyoni. In support of that submission, I was referred to a passage in the matter of *Porritt and Another v The NDPP and Others*.¹ It reads as follows:

‘The order for the recusal of the prosecutor is not based on any impartiality on the part but on the perception of lack of impartiality...’²

[6] Contextually the passage relied upon does not assist the applicant. The following passage in that judgment is relevant:

‘There is a fundamental difference between the role and functions of a prosecutor as opposed to those of a magistrate or a judge. The judiciary is held to the highest standards of

¹ *Porritt and Another v The NDPP and Others* (978/2013) [2014] ZASCA 168.

² *Porritt and Another v The NDPP and Others* (978/2013) [2014] ZASCA 168 para 5.

independence and impartiality because they are the decision makers in an adversarial judicial system. Prosecutors neither make the final decision on whether to acquit or convict, nor on whether evidence is admissible or not. Their function is to place before a court what the prosecution considers to be credible evidence relevant to what is alleged to be a crime. Their role excludes any notion of winning or losing. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings.”

It was stated further that:

“The principles that govern prosecutorial conduct must therefore be seen and understood in the context of the role that prosecutors play. In adversarial criminal proceedings such as ours, it is inevitable that prosecutors will be partisan. They conduct the case for one of the two sides in a trial, namely the state, as representing the citizenry. They often carry out their prosecutorial functions vigorously and zealously. A prosecutor’s role in a criminal prosecution therefore makes it inevitable that he or she would be perceived biased. Prosecutors usually approach criminal prosecutions with a view, sometimes a very strong view, that accused person are guilty. That is permissible, subject to the caveat that they must not prosecute in single-minded pursuit of a conviction. They have a duty towards the accused to ensure that an innocent person is not convicted. In this regard, they have a duty to disclose, in certain circumstances, facts harmful to their own case.

A prosecutor may be disqualified where his or her bias effects the accused’s right to a fair trial, where the facts instil a belief that if the case were to remain in his hands there is at the very least a real risk that he will not conduct the trial with due regard to the basic rights and dignity of the applicant.

See Porritt and another v The NDPP and others (978/2013) [2014] ZASCA 168”

[7] The test for perceived belief or bias is an objective one. It is incumbent upon the applicant to place such facts before me, which will establish that the prosecutor is not impartial. This, the applicant failed to do.

[8] The applicant seeks to rely solely upon the fact that Ms Nyoni is conceivably a witness in relation to the issues which fall for determination in the adjudication of the allegations in count 7 as set out above.

[9] The State has indicated that it will not call Ms Nyoni as witness. Ms Nyoni has indicated that she is willing to testify, should she be called upon to do so.

[10] There is nothing on the facts placed before me to support any notion of perceived bias or partiality in the sense formalities as the *Porritt* case. The fact that she conceivably may be a witness is insufficient to establish bias on her part.

[11] I am not persuaded that allowing Ms Nyoni to continue as the prosecutor will render the trial of the applicant unfair and in conflict with Article 12 of the Constitution.

[12] In the result, the application is dismissed.

P J MILLER
Acting Judge

APPEARANCES

APPLICANT: B Isaacks
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1ST and 2ND RESPONDENTS: F Sikerete
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ACCUSED 2: M Engelbrecht
Of Engelbrecht Attorneys, Windhoek