

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL APPEAL No. 0014 OF 2014

(Arising from Adjumani Grade One Magistrate's Court Criminal Case No. 074 of 2014)

IDRIFUA PATRICK **APPELLANT**

VERSUS

UGANDA **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The appellant, who at the time was the sub-county chief of Pekele sub-county in Adjumani District, was on the 2nd day of May 2014 charged with one count of Assault Occasioning Actual Bodily Harm C/s 236 of *The Penal Code Act* whereupon he pleaded not guilty. It was alleged that on the 2nd day of May 2014 at Lajopi Cesia village, Cesia Parish in Adjumani Town Council, Adjumani District, he assaulted Apio Evalyne. The complainant in the case was his wife. The applicant was released on bail on 19th May 2014 and hearing of the case commenced on 30th June 2014. The applicant did not have legal representation during his trial.

The prosecution led evidence of three witnesses. The complainant testified as P.W.1 and stated that the appellant is her husband with whom she had lived for one year and a few months. The appellant had the habit of going out to drink and returning late at night hurling insults at her and subjecting her to physical assault, even when she was expectant. On 2nd May 2014, the accused returned home drunk after a spell of two week's absence from home. When the complainant questioned him as to where he had been during that time, he became furious, kicked the kitchen door open and began assaulting the complainant by kicking and boxing her indiscriminately. The complainant eventually managed to escape to a neighbour's home where the appellant followed her and continued to assault her. The complainant again managed to escape and ran to the nearby Pekele Police post where he reported the case of assault. On being medically examined, it was found that her teeth had been badly damaged and were loose.

PW2 Azienjo Joyce happened to have been passing by the home of the appellant at the time of the incident and testified that she found the appellant with the complainant engaged in a physical confrontation while their eight months old baby was seated on the ground near then, unattended and crying. She attempted to intervene and stop the fight. The complainant was bleeding from her nose and mouth. The complainant managed to disentangle and escape to a nearby home where the appellant followed her still and continued the assault. The complainant again managed to escape and proceeded to Pekele Police Post to report the case.

P.W.3 Dr. Atiya Joseph Idoru testified that on 2nd May 2014 he received the complainant as a patient. Upon examination of the complainant, he found that she had multiple injuries on her face, particularly on the nasal part and her front lower teeth were damaged. He found more injuries around the neck and chest implying that the attacker had tried to strangle her. The injuries had been inflicted within less than the previous 24 hours and he classified them as grievous harm. That was the close of the prosecution case.

On 2nd July 2014 The trial magistrate then ruled that the appellant had a case to answer and explained the three options available to him in making his defence. The appellant opted to make an unsworn statement in his defence but said he needed a short adjournment to prepare his defence. The court then decided as follows;

Accused given two days within which to prepare his defence and in the meantime given the bitter exchange of words between the accused and the complainant in Court today, it would be sufficient and safe to cancel the bail of the accused and be remanded to keep off any possible physical encounter between themselves. Matter adjourned to 4/7/2014.

When the matter came up for defence on 4th July 2014, the Prosecutor reported that the accused had sent messages to the complainant while in prison, threatening to deal with her once he left prison. The trial magistrate cautioned the accused to desist from threatening the complainant and directed that the defence should open. In response the appellant said; "I have changed my mind and I am not going to say anything and I leave everything to court."

In a judgment delivered four days later on 11th July 2014, he was convicted as charged. He was sentenced to three years' imprisonment and ordered to pay the complainant compensation of shs. 4,000,000/=, to be partly paid by way of the shs. 2,000,000/= he had deposited as bail bond. Being dissatisfied with the outcome of the trial, the appellant lodged an appeal against both conviction and sentence on the following grounds;

1. The learned trial magistrate erred in law and fact when he failed to give the appellant a fair hearing by being biased against the appellant during the trial which caused a miscarriage of justice against the appellant.
2. The learned trial magistrate erred in law and fact when he adopted a procedure that denied the appellant the right to a fair hearing by not affording the appellant the opportunity to call witnesses in his defence.
3. The learned trial magistrate erred in law and fact when he ordered that the appellant's money U shs. 2,000,000/= deposited for bail, be paid to the complainant.

Submitting in support of the appeal, Counsel for the appellant Mr. Paul Manzi argued that the trial magistrate was biased as a result of which the appellant did not get a fair hearing which caused a miscarriage of justice. Article 28 of *The Constitution of the Republic of Uganda, 1995* guarantees the right to a fair hearing. The additional evidence adduced on appeal illustrates the complaint that there was a dispute between the appellant and the trial magistrate regarding money paid by the appellant as bail bond. The appellant was initially was not issued with a receipt. It was after he complained that the receipt was issued though on the same day. The test of bias is in the case of *Newton Ojok v. Uganda*. The test is Likelihood of bias and then reasonable suspicion of bias. There was reasonable suspicion of bias in the instant case. The Judicial officer may be conscious or unconscious. The test is that of a reasonable person. Since there were reasonable suspicion of bias, the proper procedure would be for the trial magistrate to recuse himself. The constitution requires that there should be an impartial judicial officer and

this is not merely a paper tiger. It is a fundamental right. The evidence in the affidavit shows the trial magistrate was inclined in favour of the complainant.

There was also an order by the trial magistrate at the start of the trial that the complainant should go to the home where she was living with the complainant and collect her property. That order is further evidence of unfairness and bias the matter was assault and was not for judicial separation. She took some of the appellant's trade items and that enhanced the suspicion that the trial magistrate was not acting in an impartial way. He was leaning towards the wife of the appellant. Even in the judgment, the suspicion of bias is apparent when he referred to the appellant at the conclusion at page 10 when he said he was acting like a lunatic.

In ground two, the appellant was not given adequate time to prepare for his defence. At page 6 of the record of appeal, after the closure of the prosecution he said he would give unworn evidence. He was given two days. His bail was cancelled and he was remanded. He could not prepare his defence when he was in custody. Article 28 (3) (c) of *The Constitution of the Republic of Uganda, 1995* guarantees the right to adequate preparation. It is a right that should be respected. Because of the manner in which the trial magistrate was conducting the trial, the appellant at page 7 of the record of appeal said he had changed his mind. That change of mind could be said to be a result of the frustration the appellant was feeling during the trial. The atmosphere was so tilted against the appellant that he did not feel a sense of fairness and he did not get the opportunity to call his witnesses. The mind of the trial magistrate was clouded by the bail money. He was labouring under a pecuniary interest.

In respect of ground three, he argued that the order of paying bail money to the complainant was irregular and it was not even paid as compensation for the alleged injuries. It was converted into maintenance for the child while the appellant was serving his sentence. The magistrate could not make such an order because there was no petition for maintenance. The only order he could have made was for compensation. This feeds into further suspicion of pecuniary interest. He was trying to find a safe way for accounting for the money and that is an indicator of bias. He prayed that the judgment and orders of the trial court be set aside. The appellant has already gone through enough punishment and a fresh trial would be unfair. He should be discharged.

The learned Senior Resident State Attorney undertook to file written submissions but had not done so by the time of writing this judgment.

This being a first appellate court, it is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see *Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997* and *Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997*, where it was held that: “the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it”).

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see *Pandya v. Republic [1957] EA. 336*) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see *Shantilal M. Ruwala v. R. [1957] EA. 570*). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (see *Peters v. Sunday Post [1958] E.A 424*).

The first ground of appeal focuses on the impartiality of the court below in conducting the impugned trial of the appellant. A fundamental consideration in any trial will be the independence and impartiality of the court. Article 28 (1) of *The Constitution of the Republic of Uganda, 1995* guarantees to every accused person, trial by an independent and impartial court or tribunal established by law. Much as this provision has implications for the safeguards for judicial officers against improper pressures it also envisages circumstances which may give rise to both actual bias on their part or, more commonly, well-founded apprehension that this might exist. In this context, this court is cognisant of one cardinal principle, expressed in the words of Lord Hewart, L.C.J, in *R. v. Sussex Justices ex p. M’Carthy, [1924] 1 K.B. 256 at p. 259*, that:

It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.

By reason of article 28 (1) of *The Constitution of the Republic of Uganda, 1995*, courts are held to the highest standards of impartiality. Fairness and impartiality must not only subjectively exist but must also be objectively demonstrated to the informed and reasonable observer. The trial will be rendered unfair if the words or actions of the presiding trial magistrate give rise to a reasonable apprehension of bias to the informed and reasonable observer. Judicial officers must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all litigants. A reasonable apprehension of bias, if it arises, colours the entire trial proceedings and cannot be cured by the correctness of the subsequent decision. The mere fact that the trial magistrate appears to make proper findings of fact on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias arising from his or her other words or conduct. However, if the trial magistrate's words or conduct, viewed in context, do not give rise to a reasonable apprehension of bias, the findings will not be tainted, no matter how troubling the impugned words or actions may be.

A fair trial by a fair tribunal is a basic requirement of justice. The judicial officer's impartiality is one of the essential requirements for conducting a fair trial. Impartiality implies freedom from bias, prejudice, and interest. All litigants are entitled to objective impartiality from the judiciary. It is for that reason that Principle 2.4 of the *Uganda Code of Judicial Conduct, 2003* requires a judicial officer to "refrain from participating in any proceedings in which the impartiality of the Judicial Officer might reasonably be questioned, including but not limited to..." two specific examples are then listed. This provision is a catch-all, and disqualification is not limited to the situations given as examples. Under this provision, a mere appearance of impropriety to an objective observer is enough to trigger disqualification because justice must satisfy the appearance of justice. The phrase "might reasonably be questioned" embodies a shade of doubt or a lesser degree of possibility, which suggests an objective standard requiring disqualification even if there is no actual bias. It reflects an emphasis on objective standards requiring disqualification even when the judicial officer lacks actual bias.

A fair trial is one that is based on the law and its outcome determined by the evidence, free of bias, real or apprehended. This is the reason why the appellant was, before the hearing of this appeal, granted leave to adduce additional evidence on appeal relating to the issue of bias, which was not reflected at all on the record of proceedings. It was apparent during that application that the additional evidence proposed; appeared to elucidate on the evidence already on record, was relevant to the issues raised on appeal, it was capable of belief, it would probably have influence on the result of the appeal, there were exceptional circumstance which justified its admission in that, the challenge to the impartiality of the trial court was not on record yet it was claimed the trial magistrate declined to place on record important matters of evidence that were material to the fairness of the trial, and thus the appellant would on appeal be handicapped to argue grounds based on material that did not form part of the record. Overall therefore, it was in the interests of justice to admit the additional evidence.

Attached to the affidavit submitted as additional evidence are copies of the documentary evidence. Annexure A2 is a handwritten complaint by the applicant to the Inspectorate of Government Regional Office at Moyo dated 22nd May 2014 alleging that when he deposited the cash bond of shs. 2,000,000/= for his release on bail, he was instead issued with a bail bond form (annexure A3) with an endorsement, “NC”, after the mount stated in words, indicating that he had not paid cash. He repeated that accusation subsequently in a letter to the Judicial Service Commission dated 1st July 2014 (annexure A.5) adding that he was eventually issued with a general receipt (annexure A8) only after complaining about the insertion of the initials of “NC” on his bail bond form. In the same complaint, he claimed that on the day he was charged and remanded, the trial magistrate forced him to hand over the keys to his house thereby facilitating the complainant to collect her property from the residence and vacate the home. This is evidenced by annexure A4 dated 15th May 2014, an inventory of items taken by the complainant (the court observes that it has curious content such as; the reference CRB 99/14, the phrase “under Adjumani Magistrate’s Court Order,” and the signatures of Cpl. Chombe L. and W/SPC Lulua Beatrice) which tend to corroborate the applicant’s claim of the court’s involvement in the exercise. He concluded;

I strongly feel that the Grade One Magistrate Adjumani (Mr. Kitiyo Patrick) has taken sides and should not hear my case. Lastly may your honourable office help me

recover the two million cash and some of my properties and ensure that my case is heard by another magistrate.

On 29th July 2014, writing in response to the complaint made by the applicant to the Judicial Service Commission (annexure A7 to the affidavit in support of the application), the trial magistrate stated that he did not force the applicant to hand over the keys of the residence but that he did so cordially in which event he asked the court orderly W/SPC Lulua Beatrice to accompany the complainant home and facilitate her evacuation. The applicant was released on a cash bond of shs. 2,000,000/= and he was issued with a general receipt. During the entire trial, the applicant did not complain about the complainant's evacuation nor did he ask the trial magistrate to disqualify himself. Upon conviction, the amount the applicant had deposited in court was handed to the complainant "to cater for her further treatment and for the upkeep of a young baby, leaving a balance of shs. 2,000,000/= to be paid by the convict on completion of sentence. I therefore look at this complaint as strange, malicious and made in bad faith."

The additional evidence submitted by the appellant in the instant case, does not go to the merits of the case but rather to the fairness of the trial. In essence it suggests that; the appellant got embroiled with the trial magistrate when he demanded for a receipt for bail bond paid in court yet the bail bond form had been prepared to indicate the sum was "Not Cash"; the trial magistrate favoured the complainant when he facilitated her to leave their home while the appellant was still in custody; throughout the trial, the trial magistrate was biased against the appellant prompting the appellant complain to the Regional Office of the Inspectorate of Government and later to the Judicial Service Commission; he was not given reasonable opportunity to present his defence and at the end of the trial, the trial magistrate directed that the sum of money he had deposited in court as bail bond be paid to the complainant as part payment of the order of compensation.

The argument of his counsel is that when all these factors are taken together, the appellant was denied his right to a fair trial. It is contended by the applicant that it is his insistence on being issued with a receipt for the cash bond he deposited in court that generated acrimony between him and the trial magistrate which created bias in the mind of the trial magistrate manifested by his decision to facilitate the complainant to vacate his home and refusal to record his subsequent

application for the magistrate to disqualify himself. Annexures A3, A7 and A8 are designed to establish that causal link.

In situations where an objection is taken on proper grounds at the commencement of or during the trial, the case may be transferred from the court of the Magistrate or the Judge objected to, as a matter of judicial practice, to another. No such question of judicial practice can arise as a practical question after a trial has come to an end and at that stage, the validity or otherwise of the trial already concluded must be determined by reference to the strict principles of law or indications of actual mistrial. It is a well settled principle of law that before an appellate court can nullify a judgment on the ground of bias there must be proved to the satisfaction of the court that there was in the case such a real likelihood of bias as would be sufficient to vitiate the proceedings or adjudication. As to what real likelihood of bias will suffice in this regard, one has to be guided by common sense and by certain legal principles which the courts have from time to time laid down as applicable in this type of case.

Impartiality can be described as a state of mind in which the trial magistrate is disinterested in the outcome and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result or that is closed with regard to particular issues. Whether a trial magistrate is impartial depends on whether the impugned conduct gives rise to a reasonable apprehension of bias. Actual bias need not be established because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind. In situations of allegations of bias, Lord Denning, M.R. in *Metropolitan Properties Ltd. v. Lannon*, [1968] 3 All E.R. 304, [1969] 1 Q.B. 577 held that it is enough if seemingly there is cause to think that the decision maker must have been biased. The court looks at the impression that would be given to other people. In his learned treatise *The Discipline of Law* (Butterworth, London, 1979 at 86-87), Lord Denning further addressed the question of judicial bias and referred approvingly to what Devlin J (as he then was) said in *Rep v. Barnsley Licensing ex parte Barnsley and District Licensed Victuallers Association* [1960] 2 QBD 169, where he set out the standard to be applied on the question of bias:

In considering whether there was a real likelihood of bias, the court does not look at the Justice himself or at the mind of the chairman of the tribunal or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real

likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right minded persons would think that, in the circumstances, there was a real likelihood of bias, then he should not sit, and if he does sit, his decision cannot stand..... Nevertheless, there must appear to be real likelihood of bias. Surmise or conjecture is not enough..... There must be circumstances from which no reasonable man would think it likely or probable that the justice or chairman as the case may be, would or did favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased."

In *Professor Isaac Newton Ojok v. Uganda, S. C. Criminal Appeal No. 33 of 1991*, it was decided that;

The court does not look at the mind of whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression, which would be given to other people. Even if he was as impartial as could be, nevertheless if fair minded persons would think that, in the circumstances, there was a real likelihood of bias, then he should not sit, and if he does sit, his decision cannot stand. Nevertheless, there must appear to be real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the Justice ... would or did favour one side unfairly at the expense of the other.

Similarly in *Tumaini v. Republic [1972] 1 EA 441*, it was held that in considering the possibility of bias, it is not the mind of the judge which is considered but the impression given to reasonable fair-minded and informed observers, who having considered the relevant facts, would conclude that there was a real possibility that the court is biased (see also; *R. v. Camborne Justices ex p. Pearce, [1955] 1 Q.B. 41*; *R. v. Gough [1993] A.C. 646 at 670*; *Ex parte Barusley and District Licensed Valuers Association (1960) 2 Q B D 169*; *Musiara Ltd v. Ntimama [2005] 1 EA 317*; *Porter v. Magill [2002] 1 All ER 465*; *Obiga Mario Kania v. Electoral Commission and another, C. A. Election Petition Appeal No. 4 of 2011*; *G.M. Combined (U) Ltd v. A.K. Detergent Ltd and four Others, S. C. Civil Appeal No. 7 of 1998*; *Shell (U) Ltd and Nine others v. Muwema and Mugerwa Advocates and Solicitors and another, S. C. Civil Appeal No. 02 of 2013* and *Professor*

Isaac Newton Ojok v. Uganda, S. C. Criminal Appeal No. 33 of 1991). However, objection cannot be taken to everything which might raise a suspicion in somebody's mind (per Lord Goddard, L.C.J., in *R. v. Nailsworth Licensing Justices ex p. Bird*, [1953] 2 All E.R. 652 said at p. 654).

The latter consideration is further emphasised in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.:

The test is what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence. The test applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic.

The consideration by an appellate court of alleged judicial bias in the court below proceeds from a point of considerable deference to the trial court on ground that judicial officers "are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances" (see *United States v. Morgan*, 313 U.S. 409 (1941), at p. 421). There is a strong presumption of judicial impartiality that is not easily displaced. This approach is further reflected in the decision of L'heureux-Dubé and McLachlin JJ, in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 thus;

The presumption of impartiality carries considerable weight, for as Blackstone opined at p. 361 in *Commentaries on the Laws of England*, Book III, cited at footnote 49 in Richard F. Devlin, "*We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S.*" (1995), 18 Dalhousie L.J.

408, at p. 417, “the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea”. Thus, reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect: *R. v. Smith & Whiteway Fisheries Ltd. (1994)*, 133 N.S.R. (2d) 50 (C.A.), at pp. 60-61.

The appellate court should also be mindful of the principle that allegations of judicial bias require a considerably high standard of proof. There has to be a proper and appropriate factual foundation for any reasonable apprehension of bias. The test for a reasonable apprehension of bias requires a “real likelihood or probability of bias.” In *R. v. Justices of Queen’s Court*, [1908] 2 I.R. 285, 294, Slade, J., described judicial “bias” in the following terms:

By “bias” I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must in my opinion be reasonable evidence to satisfy us that there was a real likelihood of bias. I do not think that the mere vague suspicions of whimsical, capricious and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds, was reasonably generated but certainly mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of decision.

The appellate court should further be mindful that what is required of the judicial officer is impartiality rather than neutrality. Per La Forest, L’Heureux-Dubé, Gonthier and McLachlin JJ. in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484:

Judges, while they can never be neutral in the sense of being purely objective, must strive for impartiality. Their differing experiences appropriately assist in their decision-making process so long as those experiences are relevant, are not based on inappropriate stereotypes, and do not prevent a fair and just determination based on the facts in evidence..... The reasonable person must know and understand the judicial process, the nature of judging and the community in which the alleged crime occurred. He or she demands that judges achieve impartiality and will be properly influenced in their deliberations by their individual perspectives. Finally, the reasonable person expects judges to undertake an open-minded, carefully considered and dispassionately deliberate investigation of the complicated reality of each case before them..... Judicial inquiry into context provides the requisite background for the interpretation and the application of the law. An understanding of the context or background essential to judging may be gained from testimony from expert witnesses, from academic studies properly placed before the court, and from the

judge's personal understanding and experience of the society in which the judge lives and works. This process of enlargement is a precondition of impartiality. A reasonable person, far from being troubled by this process, would see it as an important aid to judicial impartiality.

The reasonable person approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case. He or she understands the impossibility of judicial neutrality but demands judicial impartiality. This person is cognizant of the racial dynamics in the local community, and, as a member of the Canadian community, is supportive of the principles of equality. Before finding a reasonable apprehension of bias, the reasonable person would require some clear evidence that the judge in question had improperly used his or her perspective in the decision-making process; this flows from the presumption of impartiality of the judiciary. Awareness of the context within which a case occurred would not constitute evidence that the judge was not approaching the case with an open mind fair to all parties; on the contrary, such awareness is consistent with the highest tradition of judicial impartiality.

Even though the life experience of a trial magistrate is an important ingredient in the ability to understand human behaviour, to weigh the evidence, and to determine credibility. It helps in making a myriad of decisions arising during the course of most trials. It is of no value, however, in reaching conclusions for which there is no evidence. A trial magistrate must approach each case with an open mind, free from inappropriate and undue assumptions. When it is found that there was no evidence to support the conclusions that the trial magistrate reached, absence of evidence to support the decisions, comments and orders made may be a defect supportive of a reasonable suspicion of bias. Regardless of their background, all judicial officers owe a fundamental duty to the public to render impartial decisions and to appear impartial. It follows that a trial magistrate must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was predetermined or that a question was decided on the basis of stereotypical assumptions or generalizations. A trial magistrate fails the test of impartiality when it is demonstrated that he or she failed to proceed with an open-minded, dispassionate, careful, and deliberate investigation and consideration of the complicated reality of the case before him or her but instead relied on stereotypical undue assumptions, generalizations or predeterminations.

The presence or absence of an apprehension of bias is then evaluated through the eyes of the reasonable, informed, practical and realistic person who considers the matter in some detail. That reasonable person, must within the context of this case, be taken to possess knowledge of the local population and its social dynamics, including the existence in the community of domestic violence and that a judicial officer may take notice of actual incidences of domestic violence known to exist in a particular society. Judicial officers will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. A reasonable, informed, practical and realistic person should not expect that because of these experiences, judicial officers will not function as neutral symbols but that they must rely on their background knowledge in fulfilling their adjudicative function save that despite their varied personal experiences, they should have the ability to achieve impartiality in their judging. The application of common sense and human experience is an integral part of the art and skill of judging except that, in identifying and applying the law to the findings of fact, it must be the law that governs and not a judicial officer's individual beliefs. They must make those determinations only after being equally open to, and considering the views of, all parties before them and despite any personal views they may hold. The circumstances must be shown to have involved much more than the ordinary prejudices and predilections to which we are all prone but must show that there was a real possibility, or a real danger of bias. It is for such reasons that bias is defined as "extraneous prejudice and predilection or preference" (see *Regina v. Gough (Robert)* [1993] AC 646). It entails prejudgment, a settled frame of mind or conviction as shuts out any other line of thought. A mind that is not open to any further persuasion by views contrary to those it holds.

To the contrary, impartiality connotes absence of bias, actual or perceived. Impartiality of the court is a critical feature of the right to a fair hearing. There are many different factual settings which could place the impartiality of a trial court in question; among such contexts are situations where the trial magistrate has personal knowledge of the disputed facts concerning the proceedings before him or her, or where the trial magistrate has or is perceived to have a pecuniary interest, either direct or indirect, in the outcome of the case before him or her. Another such context is where the relationship of the trial magistrate to one of the parties or counsel is sufficiently close to give rise to a reasonable apprehension of bias (see Principles 2.4,

2.4.1 and 2.4.2 of *The Uganda Code of Judicial Conduct, 2003*) or any other occurrence or state of affairs by reason of which the impartiality of the trial magistrate might reasonably be questioned. There need not be proof of actual bias. The test is whether a reasonably well-informed person, considering the state of affairs giving rise to the apprehension of bias, might consider that it might have an influence on the exercise of the court's public duty. With a complex and contextualized understanding of the issues in the case, the reasonable person understands the impossibility of judicial neutrality, but demands judicial impartiality. The objective of the test is to ensure not only the reality, but the appearance of a fair adjudicative process. The test is objective and the court must shut its eyes to the fact that the appellant may be left dissatisfied and bearing a sense that justice was not done.

A reasonable apprehension of bias is inherently contextual and fact-specific. In *Wewaykum Indian Band v. Canada, 2003 SCC 45, [2003] 2 S.C.R. 259*, at para. 77, Cory J. observed:

Allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding. [Emphasis added]

An apprehension of bias can arise either from what a trial magistrate says or does during a hearing, or from extrinsic evidence showing that he or she is likely to have had strong predispositions that prevented him or her from impartially considering the issues in the case.

The available facts are that exactly seven days after being charged and three days after being granted bail, the applicant had lodged a formal complaint with the Inspectorate of Government Regional Office at Moyo (annexure B) regarding the manner in which his cash bond had been handled by the court. The day before the court found he had a case to answer, he repeated that complaint in a letter to the Judicial Service Commission (annexure D). In the same complaint, he claimed that on the day he was charged and remanded, the trial magistrate forced him to hand over the keys to his house thereby facilitating the complainant to collect her property from the residence and vacate the home (evidenced by annexure C), also expressing his strong feelings

that the Grade One Magistrate Adjumani (Mr. Kitiyo Patrick) had taken sides and should not hear his case, seeking help to recover the two million cash and some of his properties and ensure that my case is heard by another magistrate. Eighteen days after convicting and sentencing the applicant, the trial magistrate admitted (in annexure E to the affidavit of additional evidence), facilitating the complainant to vacate the home and release of the applicant's cash bond to the complainant "to cater for her further treatment and for the upkeep of a young baby."

The question now is whether, having regard to those circumstances, there was a real danger of bias on the part of the trial magistrate, in the sense that he might have unfairly regarded with favour, the case for the prosecution and disfavour, the case of the appellant, i.e. that he was motivated by a desire unfairly to favour one side or to disfavour the other. This court must examine all the relevant circumstances and consider whether there is such a degree of possibility of bias that the decision in question should not be allowed to stand, i.e. whether the informed observer could not have the necessary confidence in the proceedings.

The first aspect of the impugned conduct of the trial magistrate is issuance of a bail bond form that bore the endorsement "NC" implying that the appellant had not paid cash in court whereas he had. Whereas the handwritten insertions in the standard bail bond form appear to be in the handwriting of the trial magistrate (based on comparison with the handwriting in the handwritten trial record), the insertion "NC" does not. The handwriting of the trial magistrate generally has a straight to left-leaning back-ward slant to it, in bold evenly spaced letters and words, written with a heavy touch whereas the initials "NC" have a faint or light touch, right-leaning forward slant to them. They were inserted after the full stop at the end of the words "two million shillings only." There is also clear overwriting in those two letters with initial tentative practice-like, light strokes overwritten with bolder strokes but still lighter than the rest of the handwriting. The trial magistrate writes his "N" with distinctively more or less rounded corners at the top and bottom of the perpendicular strokes yet the "N" in the insertion "NC" has obvious sharp ends at those points. The pen pressure in the initials is lighter than that of the rest of the handwriting in the document. Even to a casual observer, the insertion "NC" cannot be attributed to the author of the rest of the document.

In paragraphs 7 and 9 of his affidavit containing the additional evidence, the appellant avers that those insertions were made by the trial magistrate and that it is upon his insistence on being issued with a receipt that he was given a back-dated receipt. In essence the appellant is imputing fraud on the part of the trial magistrate. It is trite law that allegations of fraud must be proved strictly and they require proof at a standard higher than that of the preponderance of evidence although not as high as beyond reasonable doubt (see *Kampala Bottlers v. Damanico, S. C. Civil Appeal No. 22 of 1992*). On basis of the additional evidence placed before court, I find that the appellant has not met the required standard of proof of the alleged fraud. The evidence does not even make out an appearance of fraud on the part of the trial magistrate.

In paragraph 8 of the affidavit containing the additional evidence, the appellant contends that it is his objection to the trial magistrate's fraudulent conduct in relation to the cash bail bond that sparked off open hostility towards him. Allegations of judicial bias require a considerably high standard of proof. There has to be a proper and appropriate factual foundation for any reasonable apprehension of bias. In circumstances where the additional evidence he has submitted has not established fraud as a fact or the appearance of fraud at the very least, the appellant has failed to establish a causal link between this impugned aspect of the alleged conduct of the trial magistrate and the eventual findings of fact made by the trial magistrate. When viewed in that context, I find that no reasonable, informed person, aware of all the circumstances, would conclude that those allegations gave rise to a reasonable apprehension of bias or that they tainted the conduct of the trial or the findings of fact made by the trial magistrate.

The second aspect of the impugned conduct of the trial magistrate is failure to disqualify himself and to place on record the appellant's application to that effect. In paragraph 5 of the affidavit of additional evidence, the appellant avers that the trial magistrate deliberately omitted to place on record, the request he made on 19th May 2014 for the magistrate to disqualify himself from further conduct of the trial. I have perused the record of appeal and established that 19th May 2014 was the appellant's second appearance in court, he having been charged upon his first appearance four days before, on 15th May 2014.

On 19th May 2014, the case had been fixed for hearing but the prosecutor informed court that the complainant was still in a lot of pain as the front lower teeth were hurting so much and she would not be able to testify. The appellant then applied for and was granted bail and the case was adjourned to 28th May 2014. It is not clear to me at what stage in proceedings of that nature that the appellant applied for the trial magistrate to disqualify himself. In his handwritten complaint to the Inspectorate of Government Regional Office at Moyo dated 22nd May 2014 (Annexure B of the additional evidence) the appellant did not intimate that he had ever made such an application before court. It is nearly two months later, in his letter to the Judicial Service Commission dated 1st July 2014 (annexure D of the additional evidence) that the appellant requested that; "I strongly feel that the Grade One Magistrate Adjumani (Mr. Kitiyo Patrick) has taken sides and should not hear my case..... and ensure that my case is heard by another magistrate." In none of those communications, which were made contemporaneously with the trial, did the appellant indicate that he ever made a formal request for the trial magistrate to disqualify himself or that the trial magistrate had refused to go on record upon such application. He was instead appealing to an external administrative authority to cause a transfer of the case to another magistrate.

On the other hand, when writing in response to the complaint made by the applicant to the Judicial Service Commission (annexure E of the additional evidence dated 29th July 2014), the trial magistrate stated that during the entire trial, the appellant did not ask the trial magistrate to disqualify himself. Considering the absence of a complaint specific to the point made to either the Inspectorate of Government Regional Office at Moyo or to the Judicial Service Commission, which complaints were made during the trial, I am inclined to believe the statement of the trial magistrate that the appellant did not ask him to disqualify himself at any time during the trial. This is because in both complaints the appellant expressed displeasure at how the trial magistrate had dealt with the issue of bail and evacuation of the complainant from his home but not the manner in which he was conducting the trial. I cannot conceive of any reason that could have prevented him from including that aspect in any of the two complaints, if indeed it had arisen at the time. It would appear to me to be an afterthought rather than a genuine complaint.

The communications and conduct and of the appellant at the time and during the subsistence of the trial is more consistent with an attempt to cause a transfer of the case administratively than making a direct application for recusal. In *Professor Isaac Newton Ojok v. Uganda, S. C. Criminal Appeal No. 33 of 1991*, the Supreme Court held that applications for recusal should be made to the presiding judicial officer. The additional evidence has failed to establish that such an application was ever made. It is improper to raise on appeal a question of recusal that was never placed before the trial magistrate for consideration. No such question of recusal can arise as a practical question after a trial has come to an end since at this stage, the validity or otherwise of the trial already concluded must be determined by reference to the strict principles of law or indications of actual mistrial.

In addition, even in the letter to the Judicial Service Commission dated 1st July 2014 (annexure D of the additional evidence) the appellant requested for a transfer of the case to another magistrate, based not on any objective facts as a foundation for the allegation of bias but rather on a "strong feeling" that he had taken sides. Allegations of bias based on emotions cannot be entertained in a judicial process. To do so would be to encourage forum shopping. The appellant did not at that time advance any objective basis for that request and I have not found any from the additional evidence placed before me. I find therefore that no reasonable, informed person, aware of all the circumstances, would conclude that the appellant made an application to the trial magistrate to disqualify himself. In the result, this allegation as well does not give rise to a reasonable apprehension of bias or that it tainted the manner in which the trial was conducted or the findings of fact made by the trial magistrate.

The third aspect of the trial magistrate's impugned conduct is his facilitation of the complainant to be evacuated from the home after the appellant was charged but before he was granted bail. It is argued that by doing so, the trial magistrate had taken sides with the complainant against the appellant. However, this impugned conduct of the trial magistrate must not be considered in isolation. It must be considered in light of the whole proceeding, with an awareness of all the circumstances that a reasonable observer would be deemed to know. The record must be considered in its entirety to determine the cumulative effect of any transgressions or improprieties.

Criminal trials are not simply a determination of who did what to whom, and the questions of fact and law to be determined in any given case do not arise in a vacuum. Rather, they are the consequence of numerous factors, influenced by the innumerable forces which impact on them in a particular context. A trial magistrate, acting as a fact finder, must bear those forces in mind. In short, he or she must be aware of the context in which the alleged crime occurred, otherwise the trial turns into a robotic application of the law to the facts.

It is inevitable and appropriate that the differing experiences of judicial officers assist them in their decision-making process and will be reflected in their decisions during and at the end of the trial, so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence. Judicial impartiality does not mean that a trial magistrate must have no prior conceptions, opinions or sensibilities. Rather, it requires that those experiences do not close his or her mind to the evidence and issues. There is, in other words, a crucial difference between an open mind and empty one. A judicial officer with an empty mind has no place on the bench. The requirement for impartiality does not necessitate trial magistrates to discount their life experiences. As Martha Minow in *"Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors"* (1992), 33 Wm. & Mary L. Rev. 1201, at p. 1217 elegantly noted, the ability to be open-minded is enhanced by such knowledge and understanding:

None of us can know anything except by building upon, challenging, responding to what we already have known, what we see from where we stand. But we can insist on seeing what we are used to seeing, or else we can try to see something new and fresh. The latter is the open mind we hope for from those who judge, but not the mind as a sieve without prior reference points and commitments. We want judges and juries to be objective about the facts and the questions of guilt and innocence but committed to building upon what they already know about the world, human beings, and each person's own implication in the lives of others. Pretending not to know risks leaving unexamined the very assumptions that deserve reconsideration.

The reasonable apprehension of bias test recognizes that while trial magistrates must strive for impartiality, they are not required to abandon who they are or what they know. Nevertheless,

they should avoid making any comment or order that might suggest that the determination is based on generalizations or stereotypes rather than on the specific objective facts that have come before the court during the trial. Situations where there is no evidence linking any generalization they might make to the particular decision might leave the trial magistrate open to allegations of bias on the basis that the decision was prejudged according to stereotypical generalizations.

At page 11 of the record of appeal, is the typescript of what transpired in court on 15th May 2014 where the prosecutor reported that inquiries into the case were complete but the complainant was still in a bad shape and adjournment was sought to enable her recover before she could testify. The court observed as follows;

Court has noted and seen the condition of the complainant whose face, particularly around the nasal and mouth areas [is] swollen and she looks fatigued. Adjournment shall be allowed to allow the complainant to seek further treatment. In the meantime, the right of bail is explained to the accused provided for under s. 75 MCA.

The appellant informed court that he had no surety at the time and thus deferred his bail application. The case was adjourned to 19th May 2014. However, on the same day is when court, off record, intervened to give directions for the evacuation of the complainant from the appellant's home. Annexure "C" of the additional evidence dated 15th May 2014, is an inventory of items taken by the complainant from the home consequent to that intervention. The reference cited in the inventory is CRB 99/14. It contains the phrase "under Adjumani Magistrate's Court Order," and the signatures of Cpl. Chombe L. and W/SPC Lulua Beatrice. Writing in response to the complaint made by the applicant to the Judicial Service Commission (annexure E dated 29th July 2014, of the additional evidence), the trial magistrate explained as follows;

This particular matter came up for plea on 15/5/2014 in the presence of the prosecution and the victim who at the time had a swollen face with visible bruises on her mouth and limbs and around the left eye. She also had challenges sitting upright due to the kicks allegedly subjected on her by the accused. She was also putting on [a] blood stained blouse. The court was tense and I decided to remand the accused to 19/5/2014 for hearing given the bad health condition of the victim who could not give her evidence at the moment.

However on the same day of 15/5/2014 when the matter came up for plea, the victim complained to court that the accused had locked the house and she could not change

her clothes and that of the baby. The reason she appeared in court with [a] blood stained blouse. I cordially asked the accused if he could give the keys to the victim so that he could pick her clothes from the house and the accused asked to hand over the keys to one of his brothers called Ovure Benson and that the victim should remove all her properties from his house in the presence of the LCs and police. The accused's concerns were adhered to and I asked the Court Orderlies W/SPC Lulua Beatrice to accompany the victim and the accused's brother Ovure Benson and that the house should be opened in the presence of the LC1 Chairman of the area and the neighbours. Indeed I later got information that the exercise went on smoothly and a list of all the victim's properties taken from the house was properly listed (sic) and attached to the police file.

From the material available to this court, the trial magistrate was clearly responding to the evident pre-trial needs of a victim of crime whose alleged perpetrator was pending trial before him. It is noteworthy that our criminal justice system has no set out mechanism by which a court can respond to the needs of victims of violent crime before, during and after a trial, save for the occasional orders of compensation at the end of the trial. In absence of clear guidelines provided by the law, it is understandable why a magistrate faced with those circumstances would have to resort to his personal understanding and experience of the society in which he lived and worked, to respond to the glaring needs of the victim's safety and well-being, in such a way as was not likely to jeopardise but rather enhance the just determination of the pending case, based on facts to be adduced in evidence at a later stage. Considered objectively, this was an interim measure driven by the pre-trial needs of a victim.

I have neither found anything to indicate that in intervening the way he did, the trial magistrate was propelled by any improper use of his perspective in the decision-making process nor any inappropriate stereotypes. He was keenly alive to the social context in which the allegations against the accused sprung, he took into account and catered for the sensibilities of the accused and the measures he took do not seem to have exceeded what was necessary at the time to address the immediate needs of the victim. I have not found anything to suggest that the decision he took was driven by personal predilections, preconceptions and personal views or stereotypical undue assumptions, generalizations or predeterminations but rather, his actions and orders were based entirely on the material before him, were made in response to submissions by the

prosecutor and the victim, after a consideration of the response by the appellant and on his own observations made in court and are entirely supported by the evidence on record.

To the contrary a reasonable, informed person would be surprised by a criminal court which when trying a domestic violence related case, cannot fashion out protective measures for persons who are victims of violence or who are threatened with violence by an accused person with whom the victim is in a partnership or marriage, regardless of whether the victim is living or has lived with such accused person in a household or whether the relationship has ended, when there are indications that the accused lies in wait for them, stalks or otherwise harasses them.

The decision on protective measures for the victim that the trial magistrate took that day did not affect his attitude towards the appellant as is suggested in this appeal. To the contrary, despite having observed the complainant's appearance in court in such a poor physical shape, when on 15th May 2014 the appellant finally applied for bail, the magistrate granted him bail despite the spirited opposition to the grant of bail presented by the prosecutor. The record of appeal at page 12 has the following typescript of what transpired in court;

Prosecutor: I object to the bail application because the accused is still too hostile to the complainant and we fear that he can still harm the victim given now that the matter has reached court. However if the Court decides to grant bail to the accused, then we pray that harder conditions be put in place and the accused cautioned not to make even any pointing finger to the victim.

Court Ruling: Bail is a constitutional right but I can detect the flares between the accused and the victim and realise that there is still high tension between the parties. In the circumstances of this situation, I will release the accused on cash bail of shs. 2,000,000/= and caution him not even to wink any threatening eye on the victim. Surety bonded on non-cash of shs. 5,000,000/= and I will adjourn the matter to 28/5/2014 for hearing.

In a situation where there might have been a prima facie reason to defer the grant of bail on basis of safety concerns for the victim, the trial magistrate was inclined to grant bail to the appellant. That is not conduct of a trial magistrate who had taken sides as contended by the appellant. In the circumstances, I can do no better than borrow the words of Justices La Forest, L'Heureux-Dubé,

Gonthier and McLachlin JJ. in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, "awareness of the context within which a case occurred would not constitute evidence that the judge was not approaching the case with an open mind fair to all parties; on the contrary, such awareness is consistent with the highest tradition of judicial impartiality." The impugned conduct of the trial magistrate is not a manifestation of judicial bias as claimed in this case but rather a proper exercise of personal understanding and experience in judgment to fashion out an interim protective measure for a victim of crime pending trial.

As observed in that Canadian case, the differing experiences of judicial officers appropriately assists in their decision-making process so long as those experiences are relevant, are not based on inappropriate stereotypes, and do not prevent a fair and just determination based on the facts in evidence. "The reasonable person must know and understand the judicial process, the nature of judging and the community in which the alleged crime occurred. He or she demands that judges achieve impartiality and will be properly influenced in their deliberations by their individual perspectives. Finally, the reasonable person expects judges to undertake an open-minded, carefully considered and dispassionately deliberate investigation of the complicated reality of each case before them."

To paraphrase *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, the reasonable person approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case. He or she understands the impossibility of judicial neutrality but demands judicial impartiality. This person is cognizant of the social dynamics in the local community, and, as a member of the community, is supportive of the principles of equality. Before finding a reasonable apprehension of bias, the reasonable person would require some clear evidence that the judicial officer in question had improperly used his or her perspective in the decision-making process. I have not found any improper use of personal perspective by the trial magistrate. Consequently, I find that no reasonable, informed person, aware of all the circumstances, would conclude that the decision to evacuate the complainant from the appellant's home before trial, gave rise to a reasonable apprehension of bias or that it tainted the conduct of the trial or the findings of fact made by the trial magistrate.

The third aspect of the impugned conduct of the trial magistrate is contained in paragraph 8 of the affidavit of additional evidence. There it is contended that the trial magistrate used a disparaging expression against the appellant. Although disparaging or denigratory remarks about the appellant should not have been made in the judgment, a dispassionate approach does not necessarily lay a trial magistrate open to a charge of bias. For example in *Okeno v. Republic* [1972] 1 EA 32, the appellant was convicted of stealing goods in transit. The goods were removed from a shed in the harbour area, on the same day part of them were sold by the appellant, and the balance was found in a store rented by the appellant. For him it was argued that the magistrate had been biased, on account of the fact that the magistrate in his judgment had poured sceptical scorn on the appellant's case. It was held that sarcastic and denigratory remarks about the defence case are out of place in a judgment but a dispassionate approach does not lay a magistrate open to a charge of bias. A dispassionate approach, and clear findings of fact, are more indicative of a judicial approach, and do not lay the magistrate open to a charge of possible bias. Nevertheless the court was satisfied that the judgment was adequate so far as the basic essentials of the case are concerned. There were "clear findings as to the appellant's recent possession of the goods, and as to the irresistible inferences of guilt to be drawn there from, and the evidence supported those findings and inferences."

In the instant case, the comments he made by the trial magistrate although uncalled for, were not extraneous since they all were limited to his observations made in court, and did not touch on the merit of the appellant's case, and to that extent bias ought not to be imputed. This court does not subscribe to the faculty that a judicial officer ought to be a mute listener. That a judicial officer should maintain a stony silence out of fear of allegations of bias. To the contrary, a judicial officer should be able to genuinely but reservedly engage counsel or the parties but such engagement should not leave behind an air of predetermination or prejudgment of the pending or continuing dispute. In *Brouillard v. The Queen*, [1985] 1 S.C.R. 39 at P. 44, Lamer J. noted that a judicial officer's interventions by themselves are not necessarily reflective of bias. On the contrary;

It is clear that judges are no longer required to be as passive as they once were; to be what I call sphinx judges. We now not only accept that a judge may intervene in the adversarial debate, but also believe that it is sometimes essential for him to do so for

justice in fact to be done. Thus a judge may and sometimes must ask witnesses questions, interrupt them in their testimony and if necessary call them to order.

A fine balance needs to be drawn by magistrates who are expected both to conduct the process effectively and avoid creating in the mind of a reasonable, fair minded and informed person any impression of a lack of impartiality. Appellate courts are rightfully reluctant to intervene on the grounds that a trial magistrate's conduct crossed the line from permissibly managing the trial to improperly interfering with the case. Interventions of that nature as occurred in this case do not by themselves necessarily reflect an animus against the appellant.

Lastly, the trial magistrate is assailed for the order he made for payment of compensation to the complainant out of the money paid by the appellant as cash bond into court. Indeed this order has no basis in law, was erroneous and it is accordingly set aside. Hence ground three of the appeal succeeds. However, it came after the trial and I have not found that it to be a manifestation of bias during the trial.

It is not anything that raises doubt in somebody's mind that is enough to cause a conviction to be quashed. There must be something in the nature of real bias. The requirement is that based on objective and reasonable perceptions, there was "a real danger" that the trial magistrate was biased. It must be proved that a fair-minded, informed, reasonable and prudent person or observer, knowing these objective facts, would harbour doubts about the magistrate's ability to be fair and impartial. It is a well settled principle of law that before an appellate court can nullify a judgment on the ground of bias there must be proved to the satisfaction of the court that there was in the case such a real likelihood of bias as would be sufficient to vitiate the proceedings or adjudication. Having carefully examined the conduct of the trial magistrate complained of, I have not found evidence of stereotypical undue assumptions, generalizations or predeterminations. I have instead come to the conclusion that he approached the case with an open mind, used his experience and knowledge of the community to achieve an understanding of the reality of the case, and applied the fundamental principle of proof beyond a reasonable doubt.

Save for the unwarranted denigratory remarks about the appellant in his judgment, his comments, actions and orders were based entirely on the case before him, were made after a

consideration of the evidence and in response to submissions by the prosecutor and the appellant, and were entirely supported by the evidence before the court. Impartiality is that quality of open-minded readiness to persuasion, without unfitting adherence to either party or to the magistrate's own predilections, preconceptions and personal views. A mind open to persuasion by the evidence of the parties and the submissions of counsel. I have found nothing in the actions, orders and directions of the trial magistrate that reveals a particular mind-set. Nothing in the words and conduct of the trial magistrate demonstrates to a reasonable and informed person that he was not open to the evidence and arguments presented. A reasonable, informed person, aware of all the circumstances, would not conclude that they gave rise to a reasonable apprehension of bias or that they tainted his findings of fact. The high standard for a finding of reasonable apprehension of bias was not met. Ground one of the appeal fails.

Lastly Ground two assails the magistrate for denying the appellant a reasonable opportunity to defend himself. Opportunity to defend oneself does not begin with the finding of a case to answer. The defence begins right at the time the charge is preferred, continues throughout the prosecution case with the accused being afforded the necessary facilities and opportunity to cross-examine the prosecution witnesses if he or she wishes to do so and finally by presenting his or her own defence and witnesses if he or she desires to do so. I have reviewed the record of proceedings. I have not found any instance when the trial magistrate prevented or curtailed the appellant's right to cross-examine the prosecution witnesses, present his own defence and call any witnesses he desired to. Instead, when the appellant applied for a short adjournment indeed it was granted to him. Cancellation of his bail after a finding of a case to answer was not an improper decision in light of the facts of the case. The opportunity to defend himself was accorded to him by court but he at his own volition turned it down and chose not to say anything in his defence. Nowhere on the record did he indicate that he had any witnesses to call. He therefore was not prevented from making his defence or present witnesses. This ground of appeal fails too. In the final result, the appeal is dismissed and the appellant should be returned to custody to serve his sentence. I so order.

Delivered at Arua this 10th day of August 2017.

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Stephen Mubiru
Judge
10th August 2017.