



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kirema v Republic (Criminal Appeal E023 of 2022)  
[2022] KEHC 11349 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11349 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
CRIMINAL APPEAL E023 OF 2022**

**LW GITARI, J**

**JULY 28, 2022**

**BETWEEN**

**JOHN NTHIGA KIREMA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The appellant/applicant herein has moved this court *vide* the notice of motion application dated April 25, 2022. The application seeks for the following orders:
  - a. Spent.
  - b. That the appeal herein and all incidental applications born out of the same hereto be transferred to the High Court at Embu or any other High Court station for hearing and final determination of High Court Criminal Appeal No 23/2022.
  - c. That the costs of this application be costs in the cause.
2. The applicant has based the application on 5 grounds as itemized here below:
  - a. The applicant was sentenced to serve 3 years in jail vide Cr No 1087 of 2016 by the Hon J Njoroge sitting at the Chief Magistrate's Court at Chuka Law Courts.
  - b. The complainants in the just concluded Case are the same complainants in HC Cr No 3 of 2019 where the applicant is a co-accused in the same matter at the Chuka Law Courts.
  - c. The applicant has since appealed against the lower courts judgment at the High Court in Chuka and has a high chance of success thus is desirous of being granted bail pending appeal.
  - d. The applicant has since sought to be released on bail pending appeal and it would only be fair if a different court hears it other than the one in conduct of his criminal trial.



- e. The ends of justice would be met and seen to be done if a different court other than those within the jurisdiction of Chuka Law Courts handles the applicant's appeal to void any potential bias and/or conflict in the active proceedings before the High Court at Chuka.
3. The application is supported by the affidavit sworn by the appellant/applicant on April 25, 2022 in which he reiterates the grounds above.
4. The application is opposed by Ms Maari, counsel for the respondent. She conceded that the applicant is the 3<sup>rd</sup> accused person a murder case before this court, the same being Chuka HCCRC No 3 of 2019. She further conceded that the applicant is also a party in another appeal before this court. She however disagreed with the element of bias raised and submitted that the applicant was only forum shopping.

### **Issue for determination**

5. I have considered the material canvassed in respect of the present application. The main issue for determination is whether there is a potential of the applicant suffering bias and not receiving a fair trial unless this appeal is transferred to another court of competent jurisdiction.

### **Analysis**

6. The application is expressed to have been brought under the provisions of section 81 of the *Criminal Procedure Code* (cap 75 of the Laws of Kenya) and article 50 of the *Constitution* of Kenya.
7. This court's power to transfer a criminal matter from one court to another is found in section 81 of the *Criminal Procedure Code* which provides:

- “(1) Whenever it is made to appear to the High Court—
- (a) that a fair and impartial trial cannot be had in any criminal court subordinate thereto; or
  - (b) that some question of law of unusual difficulty is likely to arise; or
  - (c) that a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the offence; or
  - (d) that an order under this section will tend to the general convenience of the parties or witnesses; or
  - (e) that such an order is expedient for the ends of justice or is required by any provision of this Code, it may order—
    - (i) that an offence be tried by a court not empowered under the preceding sections of this Part but in other respects competent to try the offence;
    - (ii) that a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction;
    - (iii) that an accused person be committed for trial to itself”.



- (2) The High Court may act on the report of the lower court, or on the application of a party interested, or on its own initiative.
- (3) ...”

8. In dealing with an application of this nature, the Court of Appeal in the case of *R v Mwalulu* [2005] eKLR stated that it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the mind of the public a reasonable doubt about the fairness and administration of justice, the test itself being objective and the facts constituting bias must be specifically stated and established.

9. In *Attorney General v Anyang Nyong'o* [2007] 1 EA 12 recently cited by the Court of Appeal in *Lubna Ali Sheikh Bajaber and anor v Chief Magistrate's Court, Mombasa and 2 others* [2018] eKLR, it was held that:

“The objective test of ‘reasonable apprehension of bias’ is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the public that a judge did not (will not) apply his mind to the case impartially[”] Needless to say, a litigant who seeks [the] disqualification of a Judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case...”

10. In this case, the applicant contends that there is a potential of bias and/or conflict if this court handles the two active proceedings that are before it that the applicant is a party. It is however trite that he who alleges must prove. In my view, the contention by the applicant is a blanket claim of the likelihood of bias that does not pass the objective test stated herein above for making an order for transfer of the matter. On a balance of probabilities, the apprehension in the mind of the applicant is not unreasonable. Having heard the murder trial where the same parties are litigating a perception of bias may arise. As stated by the Court of Appeal in the above decision the judge has to envisage what the perception of the member of public who is not only reasonable but also fair minded and informed about all the circumstances of the case. I am aware that matters in the intended appeal have been raised in the murder trial which is still on going. It would be in the interest of justice that the appeal be heard by another Judge.

**Conclusion:**

11. The application is allowed. The appeal be transferred to High Court Meru.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 28<sup>TH</sup> DAY OF JULY 2022.**

**LW GITARI**

**JUDGE**

