



**Ita & 2 others v Republic (Miscellaneous Criminal Application  
E029 of 2022) [2022] KEHC 14624 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14624 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
MISCELLANEOUS CRIMINAL APPLICATION E029 OF 2022**

**LM NJUGUNA, J  
OCTOBER 26, 2022**

**BETWEEN**

**WILLIAM NGARI ITA & 2 OTHERS & 2 OTHERS ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicants filed the application dated August 18, 2022 that seeks to invoke the provisions of article 25(c), 48, 50 and 165 (6) & (7) of the Constitution and section 5 of the High Court (Organization and Administration) Act, 2015 and 81(1)(a) (b) (2) of the Criminal Procedure Code to have this court order that MCCR/650/2020 Republic v William Ngari Ita, Silas Ita Nguru and Munene Munyi be transferred from Siakago law courts to any other magistrate's court.
2. In support of the application is an affidavit deponed by the applicants wherein they aver that they are apprehensive that they will not have a fair trial. It was averred that they made a request for reallocation of the matter but the same was declined. It was their case that their apprehension is strengthened by the unreasonableness, harshness and oppression of the learned trial magistrate who inspite of not issuing them with typed proceedings for the purposes of this application, proceeded to impose a hearing date of August 22, 2022. That on June 20, 2022, the trial magistrate granted the applicants on adjournment to file an application for transfer of MCCR/650/2020 Republic v William Ngari Ita, Silas Ita Nguru and Munene Munyi from Siakago Law Courts while on the other hand, the court proceeded to fix the matter for defence hearing on August 22, 2022.
3. It was their case that they will not get a fair and impartial hearing before the trial court at Siakago Law Courts for the reason that the complainant informed them that he had bribed the learned trial magistrates at Siakago Law Courts. Further, it was their case that justice must not only be done but must also be seen to be done and so, they prayed that the prayers sought in the application be allowed.



4. The respondent opposed the application via a replying affidavit sworn on September 6, 2022 in which it is deposed that the applicants have not set out the grounds for a stay order or transfer as required by the law because there is nothing at all in the proceedings to suggest that this matter falls under the legitimate requirements for a stay or transfer of proceedings. That the applicants' right to a fair trial is enshrined in the trial magistrate's duty to ensure that the trial should begin and conclude without reasonable delay. It was deposed that the application herein is a delaying tactic and an attempt by the applicants to defeat justice given that no evidence was adduced to support the allegations of corruption as insinuated by the applicants. It was deposed that there was nothing incorrect, illegal or improper in the trial magistrate declining to recuse herself and issuing an order that the applicants' defence hearing should proceed. It was the respondent's prayer that the application be dismissed for the same is devoid of any merit.
5. The applicants filed a supplementary affidavit wherein they denied the contents of the replying affidavit by the respondent and further averred that it was not possible for the learned magistrate to transfer the case to another magistrate within Siakago Law Courts as the complainant had implied that he has compromised all the magistrates at Siakago Law Courts. That in the circumstances, they remain apprehensive that they will not get a fair trial before any of the magistrates in Siakago Law Courts. It was deposed that a speedy trial must be balanced with a guarantee to a fair trial in that, they did not appreciate the unexplained hurry to close their case without them being heard for the purposes of delivering judgment. That their fears are well grounded for the reason that the people mentioned in their applications at Siakago Law Courts and herein have not denied or challenged the same. It was thus prayed that the application herein be allowed as prayed.
6. The court directed that the application be canvassed by way of written submissions and while the applicants failed to file their submissions, the respondent submitted that it is opposed to the orders sought by the applicants for the reason that the application is frivolous, lacks merit and amounts to an abuse of the court process. That the matter substantially proceeded before Siakago Law Courts and the same is due for defence hearing; that the Constitution under article 50(2) (e) dictates that trials ought to start and be concluded without unreasonable delay. It was submitted that the trial court was within its rights to schedule the matter for defence hearing for the reason that the stay orders had not been served upon it.
7. Further that the law on transfer of cases as anchored on section 81 specifies the grounds upon which the High Court may either upon an application or on its own motion transfer a case from one subordinate court to another. It was submitted that the applicants did not adduce evidence to support their case. Reliance was placed inter alia on the cases of Kamande & 3 Others v Republic [2004] eKLR and Shilenje v Republic [1980] KLR 132. In the end, the respondent urged this court to dismiss the application for want of merit.
8. Having considered the submissions of the respondents, the averments contained in the charge sheet, the proceedings before the trial court, I find that what is up for determination is whether the applicants have made out a case for the orders sought herein.
9. I have addressed my mind to the law regarding jurisdiction of Magistrates' Courts, the transfer of criminal cases and the powers and jurisdiction of the High Court as set out article 165(6) and (7) of the Constitution.

81. Power of High Court to change venue.

- (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) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Director of Public Prosecutions, be supported by affidavit.
  - (4) An accused person making any such application shall give to the Director of Public Prosecutions notice in writing of the application, together with a copy of the grounds on which it is made, and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of notice and the hearing of the application.
  - (5) When an accused person makes any such application, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the costs of the prosecutor.

10. In *Joseph Korir alias David arap Chonjo v Republic [2018] eKLR* that relied on *Kamande & 3 Others v Republic [2014] eKLR* the court held thus:

“When giving consideration to an application for the transfer of a case, the court will assess whether the applicant’s apprehension was reasonable and founded on sufficient material. The reason for laying emphasis on these factors is that the court has a duty to encourage trust in the integrity and independence of the Judiciary. Therefore allegations which may be directed at judicial officers, alleging bias and lack of fairness must not therefore be accepted without there being substantive evidence to back them. If a court was too quick to accept allegations of bias directed against its officers, without first demanding proper substantiation, it would erode the very foundation upon which the judiciary was founded. At the same time, the court must balance this consideration with the need to ensure that justice is not only done, but also seen to be done.”



11. It would therefore necessitate that before invoking section 81 of the CPC, the matter be looked at wholesomely for a change of venue ought not to be granted whimsically so as not to put into question the independence and integrity of the judiciary and or the judicial officer handling the matter. I have seen the lower court file and taken into account the nature of evidence already presented before the trial court. The right to a fair trial is guaranteed by article 50 (1) of the Constitution of Kenya and it requires "a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. I have carefully considered the application and supporting affidavit and I find that there is nothing to show that in any of the steps taken towards the prosecution of the applicants herein, there has been any affront to their sacred right to a fair trial. [See Stanley Muia Makau v Republic [2020] eKLR; Kabindi Koi Thethe v Republic [2021] eKLR].
12. In bringing forward their case, the applicants bear the evidential burden which means the duty of adducing evidence to support their claim that the complainant has compromised all the magistrates at Siakago Law Courts. It is not enough to simply allege, the onus remain on the applicants to prove their case. The principle is that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of fact which he assert, must prove that those facts exist. The burden of proof in a suit or proceeding, lies on that person, who would fail if no evidence at all were given on either side, See also (section 107 of the Evidence Act). [See Stanley Maira Kaguongo v Isaac Kibiru Kabuthia [2022] eKLR].
13. Mativo J (as he then was) in the case of Hellen Wangari Wangechi v Carumera Muthini Gathua [2005] eKLR, which was cited by the learned counsel for the respondent quoted with approval Lord Brandon in Rheir Shipping Co SA v Edmunds [1955] IWL 948 at 955 as follows:

“No judge likes to decide case on the burden of proof if he can legitimately avoid having to do so. There are cases, however in which owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just cause to take.”
14. He proceeded to note and state as follows:

“Whether one likes it or not, the legal burden of proof is consciously, or unconsciously the litmus test applied when coming to a decision in any particular case. This fact was further succinctly put forth by Rajah JA in Britestone PTE Ltd v Smith & Associates Far East Ltd [2007] 4SLR (R) 855 at 59: ‘The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.’”
15. Having evaluated the material placed before me, apart from the allegations as pleaded, no evidence was placed before this court to support the said allegations. I therefore hold the view that the application herein has not disclosed sufficient justification for change of venue of the hearing of the matter other than the trial court. A mere allegation without substantiation is not enough. [See John Brown Shilenje v Republic Nairobi Cr Appeal No 180 of 1980 where Trevelyan J, stated that the test is that of,

“Reasonable apprehension in the applicants or any right thinking person’s mind that a fair trial might not be heard before the magistrate. Mere allegations will not suffice; there must be reasonable grounds for allegations.”
16. In the end, I find that the application lacks merit and is hereby dismissed. The lower court file be remitted back to the trial court to proceed with the hearing.
17. It is so ordered.



**DELIVERED, DATED AND SIGNED AT EMBU THIS 26<sup>TH</sup> DAY OF OCTOBER, 2022.**

**L NJUGUNA**

**JUDGE**

.....for the applicants

.....for the respondent

