



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISC. CRIMINAL APPLICATION NO. 65 OF 2018

B E T W E E N:

MOSES INDIMULI SHABAN.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

MISC. CRIMINAL APPLICATION NO. 67 OF 2018

B E T W E E N:

HECKLES OKOMBA Alias JOSEE Alias FREDLICK AFUR.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

R U L I N G

1. The Court has before it an application to injunct an on-going trial before the Chief Magistrate’s Court in Kakamega. The Applicants are two Co-Accused before the Subordinate Court. The Applications are brought in two separate applications in two separate files. The First is Misc, Criminal Application No. 65 of 2018, where the Applicant is a Moses Indimuli Shaban. He filed his Application under a certificate of urgency, where he certifies the urgency himself.

2. The Certificate of Urgency states that:

“I, Moses Indimuli Shaban do hereby certify that this application is of utmost urgency and ought to be heard on priority basis on grounds that if injunction against the lower court proceeding are not immediately granted then the continuation of the trial proceedings will greatly prejudice my rights to a fair trial process. Furthermore, this application is arguable and has overwhelming chances of success”.

3. The Application is brought by a Notice of Motion. It seeks the following Orders:

1. “May this honourable court be pleased to allow me to apply for withdrawal of criminal cases No. 1388 and 1389 of 2018 before CM’s Court Kakamega under Section 138 CPC and article 50 (1) of the Kenyan Constitution and the application be deemed as properly filed with leave of court.

2. Such orders that may be deemed to be proper and fair in the circumstances”.

4. The Grounds that appear on the face of the Application are:

1. That I was earlier charged with an offence of being in possession of narcotic drugs contrary to Section 3 (1) (a) & 3 (2) (a) Act No. 4 of 1994 in CRC. No. 1422/17 before Hon. Maragia (RM) and acquitted under Section 87 (a) CPC on 17/1/2018.

2. That I was also charged with a second offence of robbery with violence contrary to section 295 as read with 296 (2) pc in CRC. No. 1424/17 before Hon. Wandera (PM) and acquitted under Section 202 CPC on 2/5/2018.

3. That I am currently being re-charged for the same offences and on the same facts of robbery with violence c/sec 295 as read with 296 (2) pc in CRC. No. 1388/18 and possession of narcotic drugs c/sec. 3 (1) (a) & 3 (2) (a) Act No. 4 of 1994 in CRC. No. 1389/18.
4. That my right to a fair trial is likely to be prejudiced if the cases are allowed to proceed again in contravention of sec. 138 of CPC and article 50 (1) of the Kenyan Constitution.
5. That may this honourable court put an injunction to the current proceedings at the lower court until this application is heard and determined.
6. That this application is arguable and has overwhelming chances of success.
7. That more grounds are in the sworn affidavit attached and others to be adduced at the hearing thereof.' . .

5. The Application is supported by the Affidavit of Moses Indimuli Shaban, the Applicant. In it he says:

1. That I was earlier charged with an offence of being in possession of narcotic drugs c/sec. 3 (1) (a) & 3 (2) (a) Act No. 4 of 1994 in CRC. No. 1422/17 before Hon. Maragia (RM and acquitted under sec. 87 (a) CPC on 17/1/2018.
2. That I was also charged with a second offence of robbery with violence c/sec 295 as read with 296 (2) PC in CRC. No. 1424/17 before Hon. Wandera (PM) and acquitted under sec. 202 CPC on 2/5/2018.
3. That I am currently being re-charged for the same offences and on the same facts of robbery with violence c/sec 295 as read with 296 (2) pc in CRC. No. 1388/18 and possession of narcotic drugs c/sec. 3 (1) (a) & 3 (2) (a) Act No. 4 of 1994 in CRC. No. 1389/18.
4. That my right to a fair trial is likely to be prejudiced if the cases are allowed to proceed again in contravention of sec. 138 of CPC and article 50 (1) of the Kenyan Constitution.
5. That may this honourable court put an injunction to the current proceedings at the lower court until this application is heard and determined.
6. That these cases are coming up for mention before the lower court on 31/7/2018.
7. That I have been granted personal bond of Ksh. 50,000 in respect of the narcotic case but not on the robbery with violence case making it inconsequential.
8. That my continued incarceration makes my younger sister who is in form one suffer a lot because am the sole bread winner since all our parents are dead.
9. That this application is arguable and has overwhelming chances of success.
10. That it is my constitutional right to appeal to this Hon. Court.
11. That I swear this affidavit in support of my application for withdrawal of the cases and it be deemed as properly filed with leave of court.
12. That what is deponed herein is true to the best of my personal knowledge, opinion and belief.”.

6. The Applications before the Court relate to criminal proceedings in relation to the incident that took place on 18th April 2017. The facts of that incident led to the Applicants and their alleged cohorts being charged to several serious criminal offences. The Offences were (1) Robbery with violence contrary to **Section 295** as read with **Section 296(2) of the Penal Code**, (2) **Gang Rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006** and (3) Handling stolen goods contrary to **Section 322(1) and (2) of the Penal Code**.

7. The Persons charged were (1) Leonard Amekabwa, (2) Moses Indumuli, (4) Heckles Okomba, (4) Mourine Tsesika Shikemi. Those Accused were arrested on 22 and 23 April produced to the Court on 4th May 2017 to answer the Charge of Robbery with violence only. That was in Chief Magistrate’s Court Kakamega, **Criminal Case No. 1442 of 2017**. The plea was taken before Hon. Eric Malesi SRM. The Accused applied to be released on bond or bail. That was strenuously opposed by the Prosecution but by a ruling on 11th May 2017, the Accused were released on bond of KShs.1,000,000/- (One Million Shillings only) and two sureties of the same amount. It was also ordered that the views of the victims would be taken into consideration. It appears as if this was intended to come after the decision had already been made, if they were brave enough to come forward.

8. In the same file on 2nd May 2018 Hon Hazel Wandere, after hearing an application by the Prosecution to withdraw the case under **Section 87(a)** of the Criminal Procedure Code, instead dismissed the prosecution case under **Section 202** of the **Criminal Procedure Code** on the basis that “the witnesses never testified”. It is telling that that decision makes no record of the dates on which the Court was available to actually hear the witnesses. That is relevant in light of the written complaint by the Complainant that she came to Court repeatedly and dates were changed without notice and she was never called although she was ready and able to give her testimony. The Prosecution applied to the High Court for a review. In her Ruling dated, 29th May 2018, Hon Lady Justice Sitati, reversed the decision of Hon Wandere SRM. The Prosecution was reinstated and the Prosecutor given leave to withdraw which he did. The Ruling also lists the dates on which the trial court

was not sitting and found that “the order of the learned trial magistrate dismissing this case under Section 202 of the CPC, though legal was not a proper step to take in this matter....”. The Trial Courts decision was reversed and an order for withdrawal made.

9. There was a further associated file, ***Criminal Case No. 1762 of 2018*** the Accused filed a Preliminary Objection. Later each of the co-accused were charged afresh, which gave rise to ***Criminal Case No. 1388 of 2018***. In that trial the Accused were charged under a consolidated charge sheet. In ***Criminal Case No. 1388 of 2018*** only three of the accused, (1) Moses Indimuli Shaban alias Brownii, (2) Heckles Okomba and (3) Mourine Tsisika Shihemi were charged on 8th June 2018 pursuant to a consolidated charge sheet with three counts, (1) handling, (2) robbery with violence and (3) Gang Rape.

10. The two applications now before the Court relate to existing and on-going proceedings but were brought in new files namely ***Misc 65 of 2018*** and ***Misc 67 of 2018***. The Applicants request that the two applications be heard together. In his Submissions Heckles Okomba asked the Court to read through ***Criminal Case No 1427 of 2017*** which it has done. As set out above, that is the source of the decision that was reversed.

11. In substance, the Accused are insisting that they were discharged and released and should not be subjected to “another” criminal trial. The Application is brought under **Section 138** of the ***Criminal Procedure Code*** and **Article 50(1)** of the ***Constitution of Kenya***. **Section 138** of the ***Criminal Procedure Code*** provides that: “A person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted of that offence shall, while the conviction or acquittal has not been set aside, not be liable to be tried again on the same facts for the same offence.”.

12. The Applicants argue that the continuation of the trial proceedings will greatly prejudice his rights to a fair trial.

13. In ***Misc App 67 of 2018***, in his grounds, the Applicant Heckles Okomba tells the Court he was charged in ***CRC No 1427/2017*** and acquitted by Hon Wandere. However, both in the Grounds and his Affidavit, the Applicant neglects to state the correct position, namely, that the decision was reversed by the High Court. ***Misc Criminal App 67*** asks the Court to stay the proceedings in ***Criminal Case No 1762 of 2018*** whereas in ***Misc. Criminal Application No. 65of 2018***, the Applicant Moses Indimuli Shaban asks the Court for leave to withdraw (and stay in the interim) ***Criminal Cases No. 1388 and 1389 of 2018***.

14. In summary, the Applicants are asserting that they have been acquitted previously, **AND** that decision of Hon H. Wandera has not been reversed or set aside. The record shows that is not a true reflection of the facts. The acquittal of each of the 4 Accused was reversed by Hon Lady Justice Sitati. The Applicant’s were charged afresh following which these applications were made on the basis of the acquittals by Hon Wandere. The four were charged under the same charge sheets. They were acquitted at the same time. The review was Filed as High Court Criminal Review No 198 of 2018. It reviewed the decision of Hon Wandere in Criminal Case No 1424 of 2017. The Accused in that file were 4 persons, namely, (1) Leonard Amukabwa Namtendwa, alias Lenny, (2) Moses Indumuli Shaban Alias Musa, alias Brownii alias Cheruiyot, (3) Heckles Okomba alias Josee alias Fredrick Afur (4) Mourine Tsisika Shihemi. The review reversed that decision and therefore the review applies to all four accused regardless of whether it is not File 1388, 1762 of 2018. In relation to Criminal Case 1389, the Applicant has not attached a copy of the proceedings. Nor has he made an application for the file to be called for and/or proceedings. In any event, the offence of being in possession of narcotic drugs does not form part of the Charge Sheet which is before the Court.

15. For the reasons given above, the Application is dismissed.

16. It is further ordered that, that part of the Application relating to ***Criminal Case No 1422*** and ***Criminal Case 1389*** be listed for hearing on a date taken at the Registry.

Order accordingly,

Farah S. M. Amin

JUDGE

DELIVERED ELECTRONICALLY, SIGNED AND DATED AT KAKAMEGA THIS THE 23RD DAY OF MARCH 2021.DELIVERED ON-LINE USING MS TEAMS PLATFORM

In the presence of:

Court Assistant: Owegi

Applicants: Moses Indumuli and Heckles Okomba

Respondent: Mr Mutua