



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL REVISION APPLICATION NO. E001 OF 2020

DANIEL NJENGA MURIITHI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Brief Facts

1. The applicant's undated application seeks for orders of transfer of Nyeri Criminal Case No. 17 of 2019 from the trial court to a different court. The applicant is the accused in the said case in which he faces a charge of defilement contrary to **section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006**. He faces an alternative charge of indecent act with a child contrary to **section 11(1) of the Sexual Offences Act No. 3 of 2006**.
2. The application was argued orally in court on 27th July 2021 by parties.

The Applicant's Case

3. The applicant states in his affidavit that there is delay in hearing his case as only three witnesses have testified out of the seven that the prosecution intends to call. Further that the case has not proceeded for hearing on three occasions because the police file was missing.
4. The applicant further contends that he was assaulted at Endarasha Police Station on 25/12/2018 and he informed the court on 4/4/2019 and that no action was taken.

The Respondent's Case

5. The respondent denies that there has been delay in the hearing of the case by either the prosecution or the court. According to the respondent, the applicant is the one who has caused the delay in his case. This is evident from the record in that on 3/10/2019 the matter did not proceed on account of the applicant for he said he was sick. The prosecution was ready with one witness on that day. Further, on 7/11/2018, the applicant said that he wanted the magistrate to recuse herself and when that application was declined, he brought up an incident of having been assaulted by a police officer at Endarasha Police Station before he was charged. On 4/2/2021, the applicant refused to be given a hearing date as he informed the court that he was awaiting the outcome of this application. On 23/5/2019, Dr Muriuki, PW1, was stood down pursuant to an objection made by the applicant on account that he was not the doctor who examined the complainant. Further, on 30/11/2020 both the applicant and the prosecution were not ready to proceed with the hearing for different reasons.
6. The respondent further contends that in the year 2020, no physical hearings were taking place in all the courts due to the Covid-19 pandemic which may have contributed to some delays in all courts in the country. The case actually proceeded for hearing later in the year on 22/10/2020. As such, from the outlined sequence of events, it is evident that the prosecution has not delayed the case. The respondent is ready to prosecute and close its case for it is only three witnesses remaining, the respondent is apprehensive that if the case is transferred to another court, the applicant may apply for the case to begin *de novo* which is likely to traumatise the minors who are the complainant and the key witnesses
7. The respondent stated that the assault that is alleged to have occurred on 25/12/2018 occurred before the applicant was charged in court and therefore has no bearing to this application and was not connected to the trial. The applicant raised the said issue as a delaying tactic in the trial. Notably, the applicant has not alleged any bias on the part of the magistrate save for the alleged Endarasha Police Station assault that has been explained.

The respondent therefore prays that the application be dismissed for lack of merit.

Issues for determination

8. On perusal of the application and upon hearing the oral submissions, the main issue for determination is whether the applicant has made a case for transfer.

The Law

9. **Article 50(2)(e) of the Constitution** provides:-

(2) Every accused person has the right to a fair trial, which includes the right-

(e) to have the trial begin and conclude without unreasonable delay.

10. On perusal of the trial court record, the matter has come up for hearing thirteen (13) times. It is notable that the applicant has requested for an adjournment 5 times for reasons that are not genuine and aimed at diverting the court's attention from the trial. On 23/5/2019 the applicant objected to PW1 giving evidence which caused the matter to be adjourned. On 3/10/2019 the applicant sought an adjournment on grounds that he was sick which was doubted by the respondent who was ready to proceed with one witness. On 7/11/2019, the accused made an application for the magistrate to recuse herself. The prosecution was ready to proceed with two witnesses on that day. On 2/11/2020 whereas the applicant requested for adjournment for the reason that this application was still pending hearing in this court. Notably, PW3 was in court ready to be cross-examined by the applicant who had applied that she be recalled to testify on 16/7/2020. The court declined the request for adjournment but the applicant was adamant that he would not proceed. On 30/11/2020 the matter did not proceed because both the prosecution and the applicant were not ready to proceed.

11. The prosecution applied for adjournment of the case four (4) times. The court found their reasons satisfactory and allowed their applications. On 3 instances, it was because the police file had not been availed in court. The dates are 22/9/2020, 28/9/2020 and 30/11/2020 respectively. On 18/8/2020 the prosecution applied for adjournment because ODPP offices had been closed due to Covid-19 and therefore witnesses could not be bonded. The court takes judicial notice that during the year 2020, due to the pandemic, the court activities were scaled down and thus physical hearings were dispensed with for the better part of the year. This downscaling affected all the administration of justice sectors in the country.

12. Notably, the matter came up for mention on 4/2/2021, 12/4/2021, 31/5/2021, 29/6/2021, 12/7/2021 but the applicant refused to be given a hearing date in the trial court as he was still waiting for the application for review in the High Court to be determined.

13. It is also worth noting that on several occasions, the applicant kept raising issues that were already determined by the court concerning recalling of witnesses and making flimsy complaints like the alleged assault at Endarasha Police Station. These issues had already been addressed on 30/7/2019 and on 17/9/2019 by the court. The court directed on 10/12/2019 that the applicant be supplied with all the witness statements and documentary exhibits.

14. From the above analysis, I am of the view that neither the prosecution nor the court have delayed the case. The applicant bears the greater blame in the delay. For a reason not known to the court, the applicant may be going slow to avoid expeditious disposal of his case. The case is a Sexual Offences case involving a minor and ought to be disposed off expeditiously to prevent further trauma to the said minor complainant.

15. In my view, the trial court exercised its discretion judiciously in dispensing justice and ensuring the applicant's right under Article 50(2) of the Constitution were safeguarded with a view of delivering a fair trial.

16. I find no merit in this application and it is hereby dismissed

17. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 26TH DAY OF AUGUST, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through videolink this 26th day of August, 2021.