



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**MISC. CRIMINAL APPLICATION NO. 1 OF 2020**

**KAHINDI KOI THETHE.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CORAM: Hon. Justice R. Nyakundi**

**The applicant in person**

**Mr. Mwangi for the State**

**R U L I N G**

The applicant filed a notice of motion expressed to be brought under Section 81 of the Criminal Procedure seeking leave of this Court to transfer Criminal Case No. 17 of 2009 from Kaloleni Magistrate Courts to any other Court of competent jurisdiction.

In support of the application, are the following fashioned grounds:

- (a). The applicant has lost faith in the trial Magistrate, Court and the entire registry at Kaloleni Law Courts.*
- (b). The trial Court at Kaloleni Law Courts has a predetermined mind in the applicants trial and the applicant is apprehensive that justice will not be administered.*
- (c). The complainant receives unnecessary protection from the trial Court and the applicant was denied a chance to ask extremely critical questions.*
- (d). The matters involves husband (applicant) and wife (complainant) thus a family matter and any attempt to resolve the same have been thwarted by officers stationed at the Law Courts, Kaloleni and the investigating officers at Kaloleni Police Station.*
- (e). Justice need not only be done but manifestly seen to be done.*

In opposition to the orders on transfer was a replying affidavit by one **Collins Okaka** which averred as follows interalia:

- (1). That I have read the undated notice of motion application together with its supporting affidavit dated the 3<sup>rd</sup> day of January, 2020 and the annexures annexed therein, to which I wish to respond as hereunder.*
- (2). That the instant application as filed is not only vexatious, frivolous, an abuse of the court process but the same is also laced with half-truths of facts in issue as stated by the applicant herein.*
- (3). That it is true the applicant herein is facing trial before Kaloleni Law Court in Criminal Case No. 17 of 2019, having been arraigned in the aforesaid court on 29<sup>th</sup> January, 2019 to take plea.*
- (4). That it is clear from the Court record that on the 30<sup>th</sup> May, 2019 when the matter came up for hearing before the trial Magistrate, the applicant herein told the Court that, he had family issues which he needed to attend to hence he sort for an adjournment, which was granted without any objections from myself.*
- (5). That from the Court record, it is evident that, I as the prosecutor who is in conduct of the matter before the trial Court, made*

*an application to see if the parties to the suit could try and settle this matter out of Court after realizing that, the parties therein were husband and wife though estranged and living separately.*

*(6). That from the Court record, it is also evident that, the Court indulged the parties on several occasions since they took quiet some considerable Court's time but in the end all efforts of reconciliation hit a dead end.*

*(7). That it was from this turn of events that, the trial Court gave its verdict on the 15<sup>th</sup> July, 2019 after analysis and ordered that the matter proceed to full hearing since there was no head way in the parties showing any intentions of settling this matter out of Court.*

*(8). That on the 28<sup>th</sup> October, 2019 the applicant herein made a verbal application before the trial Magistrate for the matter to be transferred from the aforesaid Court which application was vehemently opposed by myself reasons whereof are within the Court record on the said date and I truly believe this Honourable Court will have the opportunity to read from the trial Court file.*

*(9). That the court thereafter made its ruling giving its reasons interalia that, it (the trial Court) had no jurisdiction to here and determine the same hence the instant application.*

*(10). That in response to the averments contained at paragraph 4 and 5 of the applicant's supporting affidavit, I wish to state that the Court record will bare me out on the reasons I had advanced to the Court on the day the applicant made his application to have his case transferred from Kaloleni Law Court touching on the contents of the two paragraphs aforementioned.*

*(11). That further to paragraph 11 herein above, I wish to urge the Honorable Court to read some correspondence letters between the Ethic and Anti-Corruption Commission office and our offices based in Malindi and Kaloleni respectively all dated 8<sup>th</sup> August, 2019, 9<sup>th</sup> August, 2019 and 4<sup>th</sup> October, 2019 and marked "COO1, 2 and 3."*

*(12). That in response to the averments at paragraph 6 of the applicant's supporting affidavit, I wish to reiterate that we are strangers to the said allegations, and I reiterate my averments contained in our letter marked "COO3" in respect of the said allegations.*

*(13). That by the time I wrote the said letter mentioned at paragraph 13 herein above, we had only taken the evidence of the complainant who was our prosecution witness No. 1.*

*(14). That the Court record will bare us out that the investigating officer in this matter (PW2) testified and reiterated that, before the applicant was charged before Kaloleni Law Court, the officer commanding station (OCS) at Kaloleni, had pleaded with the parties to the Lower Court case to try and see if they can go back home and settle their issues there.*

*(15). That it is clear that, that approach by the said OCS also hit a snag hence they preferred the charges as against the applicant in the said Court.*

*(16). That the applicant herein has not provided any supporting document or any proof whatsoever to substantiate his claims as stated at paragraph 7 of his supporting affidavit.*

*(17). That I reiterate the averments contained at paragraph 13 herein above in response to the averments contained at paragraphs 9 and 10 of the applicant's supporting affidavit and I put the applicant to strict proof thereof.*

*(18). That in response to the averments contained at paragraph 13 of the applicants supporting affidavit, I wish to state that the applicant is being economical with the truth as the Court only requested him to ask relevant questions that were in relation to the matter that was before the Court instead of going all out in asking the complainant in the matter (PW1) embarrassing questions which touched on the personal life of the said complainant after the two became estranged and separated.*

*(19). That Court only told the applicant herein that, it was not going to entertain the personal lives of the two in any way and the applicant was also informed by the Court that, it did not want to be dragged into those personal issues.*

*(20). That in response to the averments contained at paragraph 14 of the applicant's supporting affidavit I wish to state that, those are the applicant's own speculations and misguided beliefs without any iota of proof whatsoever and I humbly urge this Honourable Court not to be swayed by the same.*

*(21). That in response to the averments contained at paragraph 15 of the applicant's supporting affidavit, I wish to state that, the same are baseless and lased with total lies as the complainant in the instant matter resides in Malindi and only comes to Court whenever her case comes up for hearing in Court. Our office goes to the extent of communicating to her and giving her an update on the progress of her matter before the trial Court and I challenge the applicant to strict proof thereof to the contrary.*

*(22). That we are not aware and we are also strangers to the troubles the applicant is referring to at paragraph 17 of his supporting affidavit.*

*(23). That I believe that, the instant application lacks merit as the reasons put forth by the applicant seeking for the orders he has mentioned in his application does not qualify or deemed to have met the criteria for the orders sought to be granted.*

*(24). That I also truly believe that, the applicant is on a forum shopping for a 'suitable' Court that he wants his matter to be heard and determined to which I humbly urge the honourable Court to decline.*

*(25). That we are apprehensive that, should the honourable Court grant the instant orders as sort then, it will mean that, the applicant will never be charged before Kaloleni Law Courts should he commit another offence in future since from the import, purport, content and meaning as stated in his instant application, he has clearly indicated that, he has no confidence/faith with the Court and the staff at Kaloleni Law Court Judiciary without providing an iota of proof as to how they are interfering with his matter before the Court.*

*(26). That contrary to the averments contained at paragraphed 20 of the applicant's supporting affidavit, I wish to state that, the prosecution has only one more witness remaining to call in the lower court matter who is the clinical officer before we make an application to close our case.*

## **Resolution**

The power of the High Court to withdraw an on-going criminal proceedings from one subordinate Court to a concurrent Court of competent jurisdiction is premised under Section 81 of the Criminal Procedure Code, which provides as follows:

- (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.*

The powers conferred on the High Court as exercisable under this Section should not be construed as just a necessary formality. The Court may do so if it is satisfied on the material placed before it. That the order on transfer serves the fair administration of justice. That the transfer was not being sought covertly with an ulterior purpose by the applicant unconnected with the vindication of the Law. The other qualification for the Court to consider under this provision relate to the existence of sufficient evidence to support some question of Law or unusual difficulty is likely to arise if the trial continue before the session Magistrate at Kaloleni.

It is therefore pertinent for the Court to remember that the jurisdiction on transfer does not proceed on flimsy grounds by an accused person. The Court has to go back to the Court below and carefully evaluate the record, and subsequent averments on transfer and rule on the justiciability of the application. The policy of the Court is to repeatedly safeguard the provisions under Article 50 (1) of the Constitution to refuse interfering with the trial at the earlier stages of the proceedings. It must also be borne in mind that the application pursuant to Section 81 of the Code has been made in good faith, in the interest of public policy and justice or stifle the process of the Law.

In general, I hold the view that when the Director of Public Prosecution exercises his mandate under Article 157 (6) of the Constitution to initiate criminal and terminates a criminal indictment before a particular subordinate Court, it remains within those walls. It is obviously outside the jurisdiction of the High Court unless on revision or appeal. The nature and extent of that mandate of the trial Court under Article 50 (1) of the Constitution is enjoyed and protected by the same constitution unless and until certain procedural or substantive infringements can be shown evidentiary to have occurred. The only force which comes in question even in those circumstances is whether, any of the actors in the adjudication of the criminal case would be prejudiced if the proceedings continue being heard by the session Magistrate.

In the instant case, the prosecution has done its part by summoning substantial number of witnesses to proof the allegations of bribery against the accused person. In the replying affidavit by **Mr. Collins Orwa Okaka**, there is only one state witness set to testify to meet the standard laid down in the cases of this nature.

I am not therefore satisfied on the basis of materials available, that the applicant/accused would not get impartial trial in Kaloleni Court. Further, from the notice of motion and corresponding affidavit, I come to the conclusion that justice would not be in peril if the case continues in Kaloleni and that Court determines the criminal charge on the merits. For those reasons, I dismiss the motion on transfer and the current trial shall proceed accordingly before Session Magistrate at Kaloleni Court.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30<sup>TH</sup> DAY OF DECEMBER 2021**

.....

**R. NYAKUNDI**

**JUDGE**

**IN THE PRESENCE OF**

**1. THE APPLICANT**

**2. MR. MWANGI FOR THE STATE**