



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL MISCELLANEOUS APPL. NO. 109 OF 2019

STANLEY MUIA MAKAU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant filed the application dated 30.1.2020 that seeks to invoke the provisions of Article 50(2)(A), 159(1) and (2) of the Constitution and Section 200, 362, 363 and 364 of the Criminal Procedure Code to have this court order that **Machakos Chief Magistrates Court, criminal case 114 of 2018** be placed before another court of competent jurisdiction for further hearing and final determination.

2. In support of the application is an affidavit deponed by the applicant where he avers that he has apprehension that he will not have a fair trial. He averred that he made a request for reallocation of the matter but the same was declined.

3. In reply to the application was an affidavit deponed by Cliff Machogu wherein he averred that the applicant had not demonstrated sufficient reason to warrant the orders sought.

a. The application was canvassed via oral submissions. Counsel for the applicant submitted that there would be no prejudice suffered if the orders sought are granted. It was further submitted that the applicant does not trust the trial court. In reply, counsel for the state submitted that the application ought to have been filed before the trial court and if dissatisfied then he would approach this court on appeal. It was counsel's argument that the applicant had not demonstrated that he had reasonable apprehension that he would not get justice. He submitted that the mere fact that the decision of the trial court was set aside does not make it a biased court and in any event the mistake that was made by the trial court had already been rectified. The court was urged to dismiss the application.

4. Having considered the submissions of both counsel, the averments contained in the charge sheet, I have addressed my mind to the law regarding personal and geographical jurisdiction of Magistrates' Courts, the transfer of criminal cases and the powers and jurisdiction of the High Court. I also considered the fact that I had found the proceedings of the trial court were irregular to the extent mentioned in the ruling dated 19.9.2019 but which were later regularized. This court had directed that the suit to proceed in the trial court.

5. I called for the trial court record and noted that the matter was to proceed with hearing on 25.3.2020. I note that on record is a letter dated 4.10.2019 by counsel for the applicant seeking a reallocation of the suit to another magistrate. The chief magistrate declined to so do and there was another letter dated 28.10.2019 by the applicant who sought to circumvent an application to the trial court and urged the chief magistrate to reallocate the matter to another court but however his plea was declined with direction that the applicant to move the trial court.

6. It is pertinent to note that the instant application raises the issue of "Jurisdiction". The letter and the affidavit in support of this application refer to the aspect of "fair trial".

7. The applicant wants this court to believe that there is another court of competent jurisdiction to handle the matter and not the trial court. Considering the limits imposed by the *Magistrates Courts Act, 2015* and according to the charge sheet, the offence was said to have been committed within Machakos County hence the criminal case is properly within Machakos *magisterial area*.

8. Whereas the magisterial area is undisputed, the courts have an administrative arrangement for the determination of cases and as it appears, the matter was allocated to be heard before Hon. Ocharo. In bringing this matter to the attention of this court, the applicant has been noted as saying that he has doubts that he shall not access justice and that is all there is to it. In considering the evidence before me consisted in the affidavit in support of the application, I am required to make a finding as to whether or not it is apparent that the applicant's apprehension is well founded. Going back to the proceedings in the trial court, I note that the charge sheet was read out to the applicant, he pleaded not guilty and he was taken through the trial process that save for the glitch in a witness statement which issue was corrected vide my ruling dated

19.9.2019, I see nothing else that brings to my mind any issue of lack of a fair trial.

9. On the other hand, I have noted the conduct of the applicant. Firstly he attempted to mislead the chief magistrate that this court had directed that the matter be reallocated to another court and yet this was not the case. Secondly, he was advised to make an application in the trial court and instead opted to approach this court directly albeit under the incorrect provisions of the law. The applicant seeks to invoke the revisionary powers of the court. However, this is not necessary because this court had earlier called for the trial court record and corrected the error that had been brought to its attention as evidenced vide the ruling delivered on 19.9.2019.

10. The correct position of the law is that if it appears that the dispensation of criminal justice is not possible, impartially, objectively and without any bias, at any place, the appropriate court may transfer the case to another court, where it feels that holding of fair and proper trial is conducive. When it is shown that public confidence in the fairness of a trial would be seriously undermined, the court at its own motion or any of the parties may seek the transfer of a case. That power is contained in section 81 of *The Criminal Procedure Code* which provides thus;

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.*

11. This provision enumerates, although not exhaustively, the extraordinary circumstances which would justify a departure from the stipulation that the place where the offence is committed is where the inquiry into, prosecution and trial of a case has to be conducted. A motion to transfer is allowed on the ground that prosecution was commenced within the right jurisdiction, but for exceptional reasons, the case should be transferred to another venue outside jurisdiction, subject to any equitable terms and conditions that may be prescribed.

12. In **Joseph Korir alias David arap Chonjo v Republic [2018] eKLR** that relied on **Kamande & 3 Others vs. 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.”

13. 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. I have seen the lower court

file and taken into account the intended witnesses and the nature of evidence to be 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. As analyzed earlier, there is nothing to show that in any of the steps taken towards the prosecution of the applicant, there has been any affront to his sacred right to a fair trial.

14. On the other hand "Forum shopping" typically refers to the act of handpicking a venue in which to try a case for purposes of gaining some unfair advantage or opportunity to throw the dice in one's favour. Such an action would be a subversion of justice with a resultant undermine in the principle of equal protection of the law. In *McShannon v. Rockware Glass Ltd. [1978] A.C. 795*, Lord Diplock rejected existence of *forum non conveniens* (the non-convenience doctrine positing the discretionary power that allows courts to dismiss a case where another court, or forum, is much better suited to hear the case) in common law stating that for the interests of all the parties and for the ends of justice, the jurisdiction must be exercised - however desirable it may be on grounds of public interest or public policy that the litigation should be conducted elsewhere and not in the English courts.

15. Having evaluated the material placed before me, I am not satisfied that it discloses sufficient justification for change of venue of the hearing in a court 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. A careful perusal of section 81 of *The Magistrates Courts Act*, shows that the provision clearly enunciates that the paramount norms of transfer of venue are "expediency" and "the interests of justice." I find that the aspersions that the accused will not get a fair trial are unsubstantiated, hence the selection of venue cannot be granted.

17. In the result it is my finding that the applicant's application dated 30.01.2020 lacks merit. The same is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Machakos this 26th day of May, 2020.

D. K. Kemei

Judge