



**REPUBLIC OF KENYA**

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

**MISC CRIMINAL APPLICATION NO. 20 OF 2018**

**JOHN KAMAU KING.....APPLICANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

**(Revision on the orders issued by the Hon. E Michieka SRM in Karatina SPMCR 20 of 2015)**

**RULING**

The application before me is brought under “section 78 of the CPC and Section (sic) 50(2) (j) of the Laws of Kenya”.

It seeks orders: -

- a) *That, this honourable superior court be pleased to hear and determine this application under the stated provisions of law or any other provisions of law it may deem fit.*
- b) *That, this honourable court be pleased to admit and give any other orders that deems just in the circumstances of this application.*
- c) *That, may this honourable court to be pleased to order for the transfer of this case to other subordinate court for hearing and determination.*
- d) *That may this honourable court be pleased to order for reinstatement of my bond terms that was revoked by the trial magistrate.*
- e) *That, the application herein be heard at first instance.*

The applicant set out the grounds for the application as follows:

- 1) *That, I am being charged for the offence of defilement c/s 8(1) and (2) of Sexual Offence Act No.3 of 2006.*
- 2) *That, during hearing the trial magistrate has been on many occasions been taking sides on this matter.*
- 3) *That, the court is not protecting my rights as an accused person on several occasions.*
- 4) *That, may this honourable court be pleased to consider a review of my sentence.*

The application is supported by the applicant’s affidavit filed on 22<sup>nd</sup> August 2018 where he depones:

- 1) *That, I am the applicant here hence competent to swear this affidavit.*
- 2) *That, I was arrested and charged for the offence of defilement c/s 8(1) and (2) of Sexual Offence Act No.3 of 2006.*
- 3) *That, I denied the charges and was remanded at Nyeri Maximum Prison, where I have been since 2015 up to date.*
- 4) *That, thereafter I was released on a bond of Kshs.100,000/= surety.*
- 5) *That, I was arrested in Nakuru on a different matter that led to my court abscond which led to cancellation of my bond.*

6) That, the court on several occasions denied me to access to prosecution evidence on time before the material day of hearing.

7) That, I have since requested the court to reinstate my bond without any success.

8) That, the trial magistrate has since denied me a chance to recall the witnesses for the cross-examination since I was sick during the hearing day.

9) That, I will abide by all the conditions set by this honourable court.

10) That, what is deponed herein is true to the best of my knowledge, information and belief.

**The Criminal Procedure Code at Section 78 provides for transfer of case where offence committed outside jurisdiction.** It states

*(1) If upon the hearing of a complaint it appears that the cause of complaint arose outside the limits of the jurisdiction of the court before which the complaint has been brought, the court may, on being satisfied that it has no jurisdiction, direct the case to be transferred to the court having jurisdiction where the cause of complaint arose.*

The Constitution at Article 50(2) provides for the right to a fair trial for every accused person which includes the right—

*(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;*

The issues for determination are whether the applicant has made a case for the transfer of the case, and whether, his rights under Article 50(2) (j) of the Constitution have been violated.

I have carefully perused the court record.

To begin with there is no sentence to be reviewed as the matter has not been concluded and no sentence has been meted out against the applicant.

The applicant was charged with the offence of Child Trafficking contrary to section “13 (a) (b)” of the Sexual Offences Act No.3 of 2006.

It was alleged that on 11<sup>th</sup> October 2015 in **Nyeri County** he intentionally organized travel arrangements for a child namely CMW aged 15 years to Olkalo sub-County with intention to facilitating the commission of sexual offence against the said CMW. In addition he faced a charge of Defilement contrary to section 8(1) (3) of the same Act where he was alleged to have committed the offence between 15<sup>th</sup> September 2015 to 5<sup>th</sup> October 2015 in **Nyandarua County**, and in the alternative committing an indecent act with a child contrary to section 11 (ii) of the same Act, with the same child at the same time and place.

It is clear that his prayer for the transfer of the case is founded on the fact that the sexual offences were committed in Nyandarua County away from the territorial jurisdiction of Karatina Law Courts.

It is evident from the record that on 9<sup>th</sup> October 2015 when he first appeared in court he faced only the charges of defilement and indecent act with a child which were committed in Nyandarua County.

The court did note that anomaly on 15<sup>th</sup> October 2015 and indicated that the matter ought to have been filed elsewhere. It was in the absence of the accused and the prosecutor sought a production order.

The accused was produced on 19<sup>th</sup> October 2015 when the prosecution made an application to substitute the charges. The application was allowed and they substituted by the addition of count 1. This justified the bringing of the charges to Karatina Law courts and gave territorial jurisdiction to the court.

On this ground, the prayer for transfer for want of jurisdiction fails.

On the issues raised with regard to the violation to his right to fair hearing and cancellation of the bond:

Hearing was set for 30<sup>th</sup> November 2015. It was fixed for 26<sup>th</sup> January 2016 because witnesses were not availed. On 26<sup>th</sup> January 2016 the complainant who was by then child in Form 2 could not attend court because she was in school. Matter was fixed on 14<sup>th</sup> April 2016 during school holidays. That day the accused was absent. A warrant of Arrest was issued and matter fixed for 21<sup>st</sup> April 2016. Accused never showed up until 11<sup>th</sup> October 2016.

It is the absconding by the accused person that led to the withdrawal by his surety on 1<sup>st</sup> November 2016. The Court never cancelled his bond. It only allowed the surety to withdraw and it was upon the accused person to get another surety to bond him out. It was his own doing and the accusation against the trial court is not true. The order for bond is still in force and the prayer for reinstatement is misplaced.

Upon the re appearance of the accused the matter was fixed for hearing on 6<sup>th</sup> February 2017 before Hon. E. Michieka SRM. On 6<sup>th</sup> February 2017 there were no witnesses. Matter was fixed for 13<sup>th</sup> April 2017. On that day the police file was missing. Prosecution applied for adjournment. Accused raised no objection save that he be given an early date. Matter was fixed for 16<sup>th</sup> May 2017. On that date, prosecution again applied for an adjournment on the ground that police file was missing. The court refused the application for adjournment and ordered for the case to proceed. Surprisingly, at 11:30am the prosecution told the court that file had now been availed but sadly, the witnesses had not been bonded. The court granted the last adjournment to the prosecution with a new date on 20<sup>th</sup> June 2017. On that date 2 witnesses were heard. Matter was fixed for further hearing on 19<sup>th</sup> September 2017. On that date the prosecutor was on leave. The matter was adjourned to 26<sup>th</sup> October 2017. The accused was absent on 26<sup>th</sup> October 2017, and the record does not show whether there were witnesses in court or not. On 31<sup>st</sup> October 2017 as he was not produced from remand.

Upon a production order being issued he was produced on 1<sup>st</sup> November 2017 and given mention date for 2<sup>nd</sup> November 2017 when a hearing date for 20<sup>th</sup> November 2017 was given.

On 20<sup>th</sup> November 2017 the police file was missing again. He did not oppose the application for adjournment. Hearing date was fixed for 21<sup>st</sup> December 2017. On that date the trial magistrate was not sitting. It was adjourned to 1<sup>st</sup> December 2017. One witness was heard and a further hearing date fixed for 15<sup>th</sup> March 2018. On that date, the accused told the court he did not have the witness statement of the witness who was present. The court ordered that he be supplied with that witness statement and adjourned to 14<sup>th</sup> May 2018 to allow accused to prepare. It was the statement of the Investigating Officer.

The Investigating Officer was heard on 14<sup>th</sup> May 2018. A further hearing date was fixed for 23<sup>rd</sup> July 2018- the prosecution sought an adjournment because their last witness was not in court. Accused did not object. Matter was fixed for 1<sup>st</sup> October 2018. Accused was not produced on a Production Order on 8<sup>th</sup> October 2018 and matter fixed for hearing on 19<sup>th</sup> November 2018. On 19<sup>th</sup> November, the record shows that the trial magistrate was on transfer and he fixed the matter for hearing on 15<sup>th</sup> January 2019.

The applicant made serious allegations against the trial magistrate; -

- That he took sides.
- That he failed to protect his rights as an accused person.
- That he revoked his bond terms.
- That the court denied him access to prosecution witness statements.
- That he was denied chance to recall witnesses.

As demonstrated above the record does not bear witness to any of these allegations.

The record shows that accused person absconded after he was granted bail. He did not avail himself, a warrant of arrest was issued and his surety withdrew in his presence. The court did not revoke his bond. His surety withdrew.

Though the prosecution caused 90% of the adjournments, when they appeared unreasonable the court put its foot down and forced the prosecution to avail the police file. It is only once that the trial court was not sitting. So, where is the blame on the court?

What is glaring from the record is that this is a matter that could have been heard in a day. The prosecution only had four witnesses. The trial Magistrate gave too much time in between one hearing date and the next yet the matter was part heard. There is no explanation on record as to why the prosecution would get a hearing date months away only to avail one witness. The court heard 3 witnesses in a span of 4 years and each witnesses' testimony lasted between 15 minutes and 30 from complainant (16 typed lines) 67 hand written lines, the doctor (7 typed lines) 20 hand written lines, Investigating Officer (7 typed lines) 26 hand written lines.

The record also shows that on 20<sup>th</sup> June 2017 the prosecutor indicated that he had 2 witnesses. Only one was heard, similarly on 14<sup>th</sup> May 2018, 2 witnesses are indicated as present, only one was heard- again, no explanation on record.

Clearly, from that angle one can understand the accused person's frustrations, and being unrepresented did not make matter any easier.

The accused would like the matter transferred to another court, another jurisdiction. However, the matter has already hit another snag as the trial magistrate has been transferred. His case is already in the category of backlog. Natural attrition has led it to a different court. It is unfortunate as this is a matter where the prosecution's case could have been concluded in a day considering its nature, involving a minor, and the number and length of witnesses. There is really no justification once the accused person was in custody why the matter took so long for hearing. This is why it is important for pre-trial conferencing to be conducted in each trial to confirm number and nature of witnesses, nature of evidence, to fix matter for hearing on a daily basis when it starts. The court could still have heard one witness per day and complete the case for the prosecution in a week in 2017 when the accused person resurfaced. The case is on the verge of denying the applicant his right to a fair trial by the delay which from the record was unexplained after the applicant's surety withdrew and he was remanded in custody.

Be that as it may, the prayers sought by the applicant are not tenable in the circumstances of the record. It will not serve any purpose to

transfer the matter anywhere, the trial magistrate has left the jurisdiction and another one will be allocated the matter.

I order therefore that:

1. The file be returned to Karatina Law Courts for further hearing and determination according to the requisite legal provisions.
2. There is no evidence on the record that the applicant sought to recall witnesses and was denied
3. The applicant's bond was not cancelled by the trial magistrate it is his surety who withdrew. His bond terms of Ksh 100,000 with a surety of the same amount prevail. If he avails a surety, he ought to be released on bond.
4. There is no evidence on the record that the applicant was denied access to witness statements
5. The application has no merit and fails.

**Dated, delivered and signed at Nyeri in open court this 29<sup>th</sup> January 2019.**

**Mumbua T Matheka**

**Judge**

In the presence of:

Ms. Jerusha Court Assistant

Mr. Magoma for State

Applicant in person

**Judge**

**29/1/19**