



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. APPLICATION NO. 52 OF 2018

ALEXANDER MURIITHI IRUNGU.....1ST APPLICANT

EMMANUEL NGUGI MAINA.....2ND APPLICANT

JAMES KAMAU.....3RD APPLICANT

VERSUS

REPUBLIC.....PROSECUTOR

R U L I N G

1. Before me is a Notice of Motion filed on 7th June, 2018. The Applicants seek an order for the transfer Criminal Case No. 7525 of 2016 from the current trial court, to any other court with jurisdiction.

2. The application is premised on the chief ground the trial court treated the Applicants unfairly

3. The Applicants jointly swore a supporting affidavit. They deposed that they were charged with the offence of Robbery with violence in Criminal Case No. 7525 of 2016 before the subordinate court at Thika; that they were tortured by the arresting officers; that they were forced to record statements against their will; that the trial court forced them to proceed with the trial before obtaining statements of prosecution witnesses; and that their request to recall **PW1**, was rejected. They concluded therefore that the trial was not fair.

4. During the hearing of the application, the 1st, 2nd and 3rd Applicants wished to rely on their supporting affidavit.

5. The DPP in opposing the motion relied on the decision of the High Court in **Leonard Njoroge Kariuki & Another v DPP [2018] e KLR**

6. The Court has considered the material canvassed in respect of the motion. Although expressed to be bought under Article 50 (2) of the Constitution and Section 362 and 364 of the Criminal Procedure Code, the motion's key prayer seeks the transfer of the case in the lower court to a different court. The Applicant's key complaints are that;

- a) The trial court proceeded with the case at a time when witness statements and evidentiary material had not been supplied to the Accused persons.
- b) that the trial court rejected the Applicant's request to recall **PW1** who testified in the said occasion.
- c) the trial court declined the applicant's prayer to hear the matter *de novo*.

7. The second and third complaints can be disposed of right away as the record does not show that the Applicants at any time applied before the trial court to recall **PW1** or to start the matter *de novo*. That said, it is not clear from the proceedings of 8.12.16 whether at the time **PW1**'s evidence was taken, the Applicants had obtained the witness statements.

8. Moreover, on 2.2.17 the Applicants sought statements of the witnesses set to testify on that date. On 7.12.17 the Applicants confirmed that they had been served with the witness statements. Subsequently two witnesses, **PW2** and **PW3** testified and were questioned by the Applicants. The allegation that the evidence of **PW1** was taken before the Applicants were supplied with his statements is not verifiable from the relevant record. But even if true, this is not a good reason by itself, to warrant the transfer of the case to another court. Ordinarily, such

transfer order would be made where there is a reasonable apprehension on the part of the Accused person that a fair and impartial trial cannot be had in the trial court before which the Accused is charged (see Section 81(a) of the Criminal Procedure Code).

9. In this regard, the Applicants have asserted that the **“trial was not fair since we were forced to proceed with the trial against our will.”** The record of the proceedings shows that the court rejected the application for adjournment by one of the Subjects on 8.12.16 because no reason was given for the said request. The trial court noting that the Applicants being minors were entitled to an expedited trial. Previously, the trial slated for 16/11/16 was adjourned due to the illness of two of the Subjects. An order was made for their treatment and the supply of statements, the latter issue being raised by the Subjects again on 2.12.17 in seeking adjournment. The trial court indicated its desire to conclude the matter in the “shortest time possible” in light of the age of the Subjects but nevertheless allowed adjournment to enable provision of witness statements to the Subjects. The trial court cannot be faulted for the manner in which it conducted these proceedings.

10. In **Attorney General v Anyang Nyong’o (2007) 1EA 12** recently cited by the Court of Appeal in **Lubna Ali Sheikh Bajaber and Anor v Chief Magistrate’s Court, Mombasa and 2 Others (2018) eKLR** , it was held that:

“The objective test of ‘reasonable apprehension of bias’ is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the public that a Judge did not (will not) apply his mind to the case impartially[“] Needless to say, a litigant who seeks [the] disqualification of a Judge comes to Court because of his own perception that there is appearance of bias on the part of the Judge. The Court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case...”

See also the Supreme Court decision in **Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and Others [2014] eKLR**.

11. Applying the above test to the facts of the subject case, I am unable to find any circumstance as would give rise to a reasonable apprehension that a fair trial cannot be had before the trial court. The fact that **PW1** may have given evidence before any or all the statements were provided does not appear to have been brought to the attention of the court at the time he testified and can be cured through recalling **PW1**. Again the Applicants have not made the application to recall **PW1** before the trial court. As stated in **R v Mwalimu [2005] e KLR** the facts constituting bias must be established by the Applicant on a balance of probabilities (see **Kinyatti v R [1984] e KLR**).

12. The Applicants do not appear to be familiar with their own proceedings as evidenced by their erroneous assertions concerning applications for the recall of **PW1** and for *de novo* hearing. Secondly, it seems that even when counsel was provided, the Applicants conducted themselves in such an unruly manner on 13.2.18 that the counsel withdrew from representing them.

13. On the facts before me, I can find no reason to allow the transfer of the case to another court. The trial is at an advanced stage and the Applicants have already cross-examined **PW2** and **PW3**. The Applicants are at liberty to apply before the trial court for the recall of **PW1** if indeed it is necessary for their defence. The application is dismissed.

DELIVERED AND SIGNED AT KIAMBU THIS 14TH DAY OF MARCH 2019.

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C. MEOLI

JUDGE

In the Presence of:

Miss Ndombi – DPP

1st to 3rd Applicants – In person

Court Clerk - Kevin