**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**MISC. CRIMINAL APPLICATION NO. 101 OF 2018**

**(Coram: Odunga, J)**

**BETWEEN**

**LEAH MUTHEU ALIAS SALOME MUTUKU...............1ST APPLICANT**

**BENERD MUTUKU ALIAS CHARLES MUTUKU......2ND APPLICANT**

**VERSUS**

**REPUBLIC..............................................................................RESPONDENT**

**(From the original Criminal Case Number 1167 of 2017 at SPM's Court, Kangundo)**

**BETWEEN**

**REPUBLIC................................................................................PROSECUTOR**

**AND**

**LEAH MUTHEU ALIAS SALOME MUTUKU.................1ST APPLICANT**

**BENERD MUTUKU ALIAS CHARLES MUTUKU.........2ND APPLICANT**

**RULING**

1. In this application, the applicants herein substantially seek an order that Kangundo SPMCRC No. 1167 be transferred to another court which will accord them a fair trial as enshrined by the Constitution and that their trial starts afresh.

2. The application was based on the grounds that the trial court rejected their application to recall some of the prosecution witnesses and also failed to provide them with the proceedings in order to enable them prepare their defence and file their submissions.

3. In their affidavit in support of their application, the applicants averred that their fears that they are unlikely to get a fair trial was informed by the fact that the trial court had frustrated all their applications without reasonable grounds and without affording them an opportunity to explain themselves. According to them the failure by the trial court to accord them an opportunity to file their submissions on no case to answer before making a ruling on the same, when they were ready to do so amounted to violation of their rights under Article 50 of the Constitution. It was further contended by the applicants that the trial court declined to reinstate the bond/bail for the 2nd applicant. The applicants complained that after perusing the proceedings supplied to them, they realised that what was recorded therein is contrary to what actually transpired in court.

4. In opposing the application, the Respondent relied on a replying affidavit sworn by **Mogoi Lilian**, the Prosecution Counsel in the office of the Director of Public Prosecutions, Machakos.

5. After setting out the manner in which the lower court proceedings were conducted it was deposed that the trial court has not in any way acted in a manner that contravenes the rights of the applicants or shown any biasness (sic) towards the applicants. According to the deponent, at no time did the applicants complain to the trial court or raise issues regarding the manner in which their trial was being conducted. Instead

they were satisfied with the trial process up to the time when they were placed on their defence.

6. It was therefore the Respondent's case that the applicants had not given any solid reasons or demonstrated prejudice that they are likely to suffer if the matter proceeds to its logical conclusion especially since the matter is pending the defence hearing. To the Respondent without valid reasons advanced by the applicants as to why the case should be transferred to another court, there is reasonable apprehension that the applicants are on a court shopping spree hence the application ought not to be entertained. In the Respondent's view if the applicants are aggrieved they have a right of appeal.

7. I have considered the issues raised in this matter. I have noticed that the applicants have raised some fresh issues in their submissions which were never raised in their affidavit notwithstanding that this court accorded the applicants several opportunities to place their whole case before the court. I will therefore not consider the new factual issues raised by the applicants in their submissions.

8. Apart from that, the application before me is an application seeking transfer of the case from the trial court to another court. However, in their submissions the applicants have approached the matter as if what is before me is an appeal against the proceedings before the trial court.

9. Regarding the circumstances under which this Court transfers a case from one magistrate to another, **Trevelyan, J** in **Shilenje vs. The Republic [1980] KLR 132**, held that:

> **"On the authority of such cases as *Re M S Patel's Application (1913) 5 KLR 66* and *The Republic vs. Hashimu [1968] EA 656* (a Tanganyika case), I am asked to say that the application should be granted if I am satisfied that a clear case has been made out that the applicant has a reasonable apprehension in his mind that he will not have a fair and impartial trial before the magistrate; and save, that I would rather use my expression "a real apprehension, honestly held and reasonably based" for "reasonable apprehension", I would not quarrel with that. But I am asked, also, on the authority of later English decisions such as *Metro-politan Properties Co (F G C) Ltd vs. Lannon [1969] 1 QB 577* and *Hannam vs. Bradford City Council [1970] 2 All ER 690* to hold (if I understood counsel correctly) that the question falls (in the end) to be resolved on the basis that, if right-minded people would have a suspicion that a fair trial was not to be had, that is enough to require the application to be granted. I would like to go into the question a little more closely than that; and I derive much help from the commentaries upon section 526 of the *Indian Code of Criminal Procedure 1908* made by two eminent writers, both former judges, Sir H T Prinsep and Sir John Woodroffe, i.e the former's *Commentary and Notes* (14th Edn) and the latter's *Criminal Procedure in British India* (1926). On page 646 of Prinsep we find:**
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> ***'The High Court will always require some very strong grounds for transferring a case from one judicial officer to another, if it is stated that a fair and impartial inquiry or trial cannot be held by him, especially when the statement implies a personal censure on such officer.'***

**and I endorse entirely. It would be thoroughly unfair to such officers were it otherwise. At page 647 we have:**

> ***'What the court has to consider is not merely the question whether there has been any real bias in the mind of the presiding judge against the accused, but also whether incidents have not happened which, though they may be susceptible of explanation and have happened without there being any real bias in the mind of the judge, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial. It is not every apprehension of this sort which would be taken into consideration, but when it is of a reasonable character, and not withstanding that there was to be no real bias on the matter, the fact that incidents have taken place calculated to raise such reasonable apprehension ought to be a ground for ordering a transfer.'***

**Again I agree; it is, as it were, the objective approach to the problem supplementing the subjective approach which I have just previously set out. Then we have:**

> ***'Whether such apprehension is reasonable must be determined with reference to the mind of the court rather than to the mind of the accused. The court cannot accept as reasonable grounds what the judges know to be insufficient and unreasonable, simply because the litigants were foolish enough to entertain them. To do so would be to encourage a distrust in the integrity and independence of the courts which would amount to a serious evil.'***

**which also must be so, or so I think. Then it is said:**

> ***'But although each of the several grounds imputing bias may not be sufficient in itself for ordering the transfer of a case to another court, they may, taken together form reasonable grounds for the accused apprehending that he may not have a fair trial.'***

**which again, as I think, must be so. And finally, on page 648 we have:**

> ***'It is the duty of the court to have regard to the importance of securing the confidence of the public generally, of every section of the community, in the fairness and impartiality of the trial that is to be held, and it is equally its duty to see that no undue regard is shown to the abnormal susceptibilities of any section of the public from an apprehension of ulterior consequences.'***

**Which I am prepared to accept; but this does not relieve the court from resolving the question on the evidence before it in the light of what the section under discussion provides, which is what, as I understood it, counsel for the respondent urged upon me.**

**On pages 612 and 613 of Woodroffe, we have:**

> ***"…This clause deals with the case in which the High Court is satisfied that a fair and impartial inquiry cannot in fact be had; but such cases are rare, for to move a case from one magistrate to another on grounds personal to him is tantamount to a severe censure of such officer and the very clearest grounds must exist before the High Court will interfere…A more ordinary class of case is that in which, the High Court is not of itself of opinion that affair and impartial inquiry cannot be had yet a party has reasonable grounds for the apprehension that he will not have affair trial which is another matter. It is not sufficient that justice is done; but it must also appear to have been done. The law in such a case has regard not so much to the motive which might be supposed to bias a judge as to susceptibilities of the litigant parties. One important object is to clear away everything which might engender suspicion or distrust of the tribunal and thus to promote the feeling of confidence in the administration of justice which is essential to social order and security…The transfer of a case will therefore be granted not on the ground that the judicial officer is incapable of performing his duty, but simply to allay the apprehension of the applicant for transfer…The question in such cases is not whether there is actual bias…but whether there is reasonable…ground for suspecting bias…and whether incidents may have happened which, though they might be susceptible to explanation and may have happened without there being any real bias in the mind of the judge, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial…The necessary condition, however, for the transfer in such a case is that the apprehension to justify a transfer must be reasonable, that is, the court ought not to be guided by the impressions produced in his own mind as to the impartiality of the magistrate, but must look to the effect likely to be produced in the mind of the parties to the action of the magistrate…Abstract reasonableness, however, ought not to be the standard…'***

**Which, if not precisely the same as Prinsep, is in line with it."**

10. It is recognized that "*It is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice. This requires that public officials not only in fact properly discharge their responsibilities but also that such officials avoid, as much as possible, the appearance of impropriety*." **(People vs. Rhodes (1974) 12 Cal. 3d 180, 185 [115 Cal. Rptr. 235, 524 P.2d 363]**).

11. The principles that emanate from the foregoing are that in order to justify transfer of a case from one judicial officer to another, there ought to be a real apprehension, honestly held and reasonably based that the accused may not have a fair and impartial trial. Accordingly, some very strong grounds are required for transferring a case from one judicial officer to another. However, though incidents have not happened which, though they may be susceptible of explanation and have happened without there being any real bias in the mind of the judge, they may, nevertheless be such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial. Whether such apprehension is reasonable must be determined with reference to the mind of the court rather than to the mind of the accused since the court cannot accept as reasonable grounds what the judges know to be insufficient and unreasonable, simply because the litigants are unreasonably foolish enough to entertain them. To do so would be to encourage a distrust in the integrity and independence of the courts yet it is the duty of the court to have regard to the importance of securing the confidence of the public generally, of every section of the community, in the fairness and impartiality of the trial that is to be held. It is equally, its duty to see that no undue regard is shown to the abnormal susceptibilities of any section of the public from an apprehension of ulterior consequences. With regard to transfer of cases on grounds that a fair and impartial inquiry cannot in fact be had, cases which are very rare to come by, on grounds personal to the judicial officer, is tantamount to a severe censure of such officer and the very clearest grounds must exist before the High Court will interfere.

12. In this case, the applicants averred that the trial court frustrated all their applications without reasonable grounds and without affording them an opportunity to explain themselves. The applicants have however, not pointed out the said applications. I have, on my part, perused the record and I have not come across any application made by the applicants which were allegedly frustrated. As rightly stated by the learned prosecution counsel, the trial seems to have proceeded smoothly until the applicants were placed on their defence. Although the applicants have contended that the proceedings have omitted part of what transpired in court, they have not pointed these instances. An allegation such as the omission to record part of the proceedings is such a serious matter that ought not to be treated lightly. Where such allegations are made they go to the integrity of the judicial officer concerned and therefore it is necessary that such omissions be pointed out with precision and particulars thereof given. As stated above, where such allegations are the basis for seeking transfer, very clearest grounds must exist before the High Court will interfere since such a ground is personal to the judicial officer concerned and its acceptance is tantamount to a severe censure of such officer. I am not satisfied, based on the material placed before me, that the applicants have proved that the recorded proceedings do not reflect the actual events that took place before the trial court.

13. As regards the failure to reinstate the bond, it is clear that on 5th July, 2018, the Learned Trial Magistrate after placing the accused on their defence, cancelled the 2nd accused's bond. No reason was given for that drastic step. In **Opondo vs. The Republic [1978] KLR 25**, **Trevelyan and Todd, JJ** held that:

> **"When the prosecution closed its case, the magistrate resolved to cancel the appellant's bond and remanded him in custody. He has recorded: 'After the end of the prosecution case court finds accused's had case to answer. This prompted [the appellant's] bond to be cancelled'. He may have taken the view that, having found that each of the accused had a case to answer, he was required to cancel the appellant's bond (the other accused was in remand); but, if that is so, he has misunderstood the situation. A court does not have to cancel an accused's bond simply because the point in a trial has been reached where a prima facie case has been made out. But the magistrate did exhibit no bias to us. We know of no local decision, no practice direction, concerning bail during trial in a magistrate's court, and the matter being of general importance we express the view (guided by *Practice Direction Crime: Bail during Trial*) [1974] 1 WLR 770 issued by the English Court of Appel of 4th June 1974), that once a trial has begun, the further grant of bail is in the discretion of the trial magistrate. But, an accused who has been on bail while on remand should not be refused bail during the trial unless in the opinion of the magistrate there are positive reasons to justify this refusal, e.g. that a point has been reached where there is a real danger that the accused will abscond, either because the case against him is going badly for him, or for some other reason, or there is a real danger that he may interfere with witnesses. There is no rule of practice that bail shall not be renewed when a prima facie case has been established against an accused; but every case must be decided in the light of its own circumstances and having regard to the magistrate's assessment from time to time of the risks involved. Once the**

**magistrate has convicted an accused, the further renewal of bail where a custodial sentence is a likely consequence, should be regarded as exceptional."**

14. While that action was clearly a misdirection, I am not prepared to elevate it to bias. It is, in my view, an error that, taken alone, can be dealt with through revisionary powers of this court pursuant to Article 165(6) and (7) of the Constitution as read with section 362 of the ***Criminal Procedure Code***. However, the applicants also complained that the learned trial magistrate did not accord them an opportunity to submit before placing them on their defence.

15. Section 21o of the ***Criminal Procedure Code*** provides as follows:

> ***If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.***

16. It is therefore clear that before the court makes a decision as to whether the accused has a case to answer it ought to accord the accused an opportunity to submit on the issue. Failure to do so, in my view amounts to a denial of the accused an opportunity to put their case forward at one stage of the trial. That, clearly is a manifestation of unfair trial under Article 50 of the Constitution.

17. It is therefore my view that whereas taken separately, the two grounds may not justify the transfer of the case, the cumulative effect of the same however, leads me to the conclusion that the said incidents, though might be susceptible to explanation and may have happened without there being any real bias in the mind of the trial magistrate, are nevertheless such as are calculated to create in the mind of the applicants a reasonable apprehension that there may be some unfairness and lack impartiality in the trial.

18. In the premises, while I decline to direct that the trial commences *de novo*, I hereby direct that Kangundo SPM Criminal Case No. 1167 be transferred to the Chief Magistrate's Court, Machakos for further proceeding in accordance with the provisions of section 200 of the ***Criminal Procedure Code***. For avoidance of doubt the applicant's bond terms are hereby reinstated.

19. It is so ordered.

**Ruling read, signed and delivered in open Court at Machakos this 29th day of May, 2019.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Applicants in person**

**Ms Mogoi for the Respondent**

**CA Geoffrey**