REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CRIMINAL APPLICATION NO. 93 OF 2018

(Coram: Odunga, J)

BETWEEN

LIVINGSTONE MUHANDA ATILA ALIAS MWANA

DAVID MAULA MAKAYAU.....APPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

(From the original Criminal Case Number 297 of 2014 at SPM's Court, Kangundo)

BETWEEN

REPUBLIC.....PROSECUTOR

AND

LIVINGSTONE MUHANDA ATILA ALIAS MWANA.....1ST ACCUSED

DAVID MAULA MAKAYAO.....2ND ACCUSED

RULING

1. By an application filed on 2nd July, 2018, the applicants herein, considering the totality of the body of the application and the contents of the supporting affidavit seems to be seeking an order that the case facing them in Kangundo Senior Principal Magistrate's Court being Criminal Case No. 297 of 2014 be transferred. I am saying "seems" because the application itself is not very clear as to the nature of the orders sought. However, the supporting affidavit alludes to a transfer of the said criminal case.

2. The application was supported by affidavits sworn by the applicants herein.

3. According to the 1st applicant, **Livingstone Muhanda Atila alias Mwana**, in the said criminal case they have been charged with attempted robbery with violence contrary to section 297(2) of the ***Penal Code***. It was deposed that the applicants requested the trial court to stop admitting more prosecution witnesses after the close of the prosecution case and after they submitted no case to answer and the matter was at defence stage. It was further contended that during the trial it emerged that the prosecution witness' statements that were being relied upon by the prosecution were different from the ones supplied to them.

4. According to the applicants, their application to call their three witnesses were rejected by the trial court. It was further contended that the applicants' application to be supplied with OB No. 26 of May, 2014 from Tala Police Post and OB No. 8 of 2014 from the same Post were similarly rejected by the trial court.

5. 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.

6. According to her, the trial of the applicants begun before **Hon. Mugambi** on 16th May, 2014 till 21st July, 2014 when the trail magistrate recused himself from hearing the case and directed that the same be transferred to Machakos Law Court after hearing the evidence of PW1.

The matter was then placed before **Hon Nyagah**, the Chief Magistrate, Machakos who heard PW1's cross-examination before going on transfer. After complying with section 22 of the ***Criminal Procedure Code***, **Hon. Mbugua** decided to proceed with the matter from where it had reached and two witnesses testified before him before an application was made by the prosecution for transfer of the matter to Kangundo in order to facilitate expeditious prosecution which application was supported by the applicants. However, that application was rejected by the Court which directed that the mater proceeds in Machakos after which the Court proceeded to hear the testimony of one more witness before the matter went back to Kangundo Law Courts, where the same was placed before **Hon. D Orimba** who proceeded to hear 4 prosecution witnesses after which the prosecution closed its case.

7. Upon being placed on their defence, the 1st applicant raised an alibi defence prompting the prosecution to request for another date in order to adduce rebuttal evidence. However, the prosecution abandoned that course and the Court proceeded to reserve a judgement date.

8. It was therefore contended that the trial court has not in any way acted in a manner that contravenes the rights of the applicants or shown any bias towards them to warrant the transfer of the case to another Court. It was contended that there was no evidence that the applicants raised any issue as to the manner in which the trial was being conducted and there are no solid reasons given or a demonstration of prejudice likely to be occasioned to the applicants if the case proceeds to its logical conclusion especially now that the matter is pending judgement.

9. The Respondent lamented that this matter has been pending in Court for four years hence it is in the interest of justice that the trial comes to an end. The Respondent was therefore apprehensive that the applicants are on a Court shopping spree and hence the application ought not to be entertained. In the Respondent's view if the applicants are aggrieved they have a right of appeal.

10. I have considered the issues raised in this matter. From the record it is clear that the reason why **Hon. Mugambi** recused himself from the conduct of the matter was because he was clearly unhappy with the conduct of the prosecution in either failing to adhere to his orders to supply the accused with the witness statements or the supply of statements which were different from the ones the prosecution was relying on. Accordingly, the matter was transferred to Machakos Law Courts for trial. It is true that on 1st August, 2016, the trial court declined an application to have the matter transferred back to Kangundo Court and ordered that the matter would proceed before the Machakos Law Court. However, it looks like there was another order retransferring the matter back to Kangundo Law Courts for hearing.

11. With respect to 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."

12. 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])**.

13. 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.

14. In this case as I have stated hereinabove, the applicants pointed out three incidents which in their view would justify the transfer of the case. The first ground was that the trial court permitted more prosecution witnesses after the close of the prosecution case and after submissions of no case to answer and the matter was at defence stage. The ruling on no case to answer was made on 5th April, 2018, The record does not show that any prosecution witness was called thereafter. There was an attempt by the prosecution to call for rebuttal evidence pursuant to section 309 of the ***Criminal Procedure Code***, but that course seems to have been abandoned by the prosecution. In my view the mere fact that the learned trial magistrate gave the prosecution an opportunity to call for rebuttal evidence cannot be evidence of bias. As to whether in so doing, he exercised his discretion properly, can only be a ground for an appeal which does not arise here as the rebuttal evidence was, in fact, not adduced at the end of the day.

15. It was further contended that during the trial it emerged that the prosecution witness' statements that were being relied upon by the prosecution were different from the ones supplied to them. This was an allegation that was made against the prosecution and not the trial court. The issue was taken up during the trial and the initial trial magistrate was unimpressed by the conduct of the prosecution in that regard and that led to that particular magistrate recusing himself from the matter. The proceedings do not show that there was improvement on the conduct of the prosecution thereafter. That is clearly a matter that may go to the determination as to whether there was in fact a fair trial. However, since that conduct is not attributed to the trial magistrate, it is my view that it cannot be a ground for a transfer of a case whose hearing has been concluded. It may however, be properly taken on appeal.

16. The third ground was that the applicants' application to call their three witnesses were rejected by the trial court. From the record after the provisions of section 211 of the ***Criminal Procedure Code*** were explained to the applicants, the 1st accused is recorded as stating that he had one witness to call while the 2nd accused indicated that he was not calling any witness. The applicants then testified after which the hearing was adjourned at the request of the 1st applicant to enable him avail his witness. However, at the resumed hearing date on 2nd July, 2018, the 1st applicant informed the court that he wished to close his case. Similar sentiments were made by the 2nd applicant. In fact, this position was confirmed further on 17th July, 2018. It is therefore clear that the allegation that the applicants were denied an opportunity of calling their witnesses is not supported by the record.

17. The applicants also contended that their application to be supplied with OB No. 26 of May, 2014 from Tala Police Post and OB No. 8 of 2014 from the same Post were rejected by the trial court. It is true that on 26th November, 2015, before **Hon. L Mbugua** the 2nd applicant applied for the said OBs and the investigation diary. That application was not opposed and was in fact allowed. The same issue was revisited on 19th May, 2016. The issue does not seem to have been taken up again till the current trial magistrate, **Hon. D Orimba,** took over the matter on 11th May, 2017. Thereafter the issue of the OB never featured at all. Accordingly, that issue cannot be the basis for transferring the matter from the learned trial magistrate as the issue was never raised before him and he never made any decision thereon.

18. Having considered the facts raised in this application, I am not satisfied that the applicants have proved that there is a real apprehension, honestly held and reasonably based, that they have or will not receive a fair and impartial trial from the Learned Magistrate.

19. In the premises, the application fails and is dismissed. Let the Lower Court filed be returned to Kangundo Law Courts to be dealt with in the usual manner.

20. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 28th day of May, 2019.

G V ODUNGA

JUDGE

In the presence of:

Applicants in person

Ms Mogoi for the Respondent

CA Geoffrey