REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. CRIMINAL APPLICATION NO. 13 OF 2018

RONALD NYAGA KIORA...APPLICANT

VERSUS

REPUBLIC..RESPONDENT

RULING

1. The applicant Ronald Nyaga vide a Notice of Motion dated 7/12/17 brought under **Article 22(1), 23, 25, 50, 165(6) & 7 and 259(1) of the Constitution and Section 5 of the High Court (Organization and Administration)Act** and **Section 81(1)(a),(b) & 2 of the Criminal Procedure Code** seeks the following orders:-

> **a. THAT** defence hearing in Runyenjes Criminal Case No. 412 of 2015 between Republic –v- Ronald Nyaga Kiura be stayed pending hearing and determination of this application.
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> **b That** Runyenjes Criminal Case No. 412 of 2015 be transferred to the High court or to any other Magistrates Court within Embu County.

2. The application is based on the following grounds:-

> (a) The applicant is apprehensive that he will not get a fair and impartial trial before the trial court Runyenjes Law Courts for the reasons that:
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> > (i) The trial court has handled Criminal Case No. 413 of 2015 between **Republic –v- Ronald Nyaga Kiura** on similar offences.
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> > (ii) The trial court has handled Criminal Case No. 409 of 2015 between Republic –v- Patrick Mutugi Njue.
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> > (iii) Patrick Mutugi Njue was arrested together with the Applicant on 18th July, 2015.
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> > (iv) The trial court has handled Criminal Case No. 120 of 2016 between Republic –v- Cecily Njoki.
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> > (v) The offences in the four cases relate to National Drinks Control Act.
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> > (vi) The witnesses in the four cases were same namely PC Shihachi, PC Lagat, Sgt. Sakwa, Sgt. Marete and Runyenjes OCS Muriithi.
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> > (vii) Having convicted Patrick Mutugi Njue and Cecily Njoki, the trial court has already formed an opinion that the witnesses are truthful and credible.
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> > (viii) The trial Court refused to recuse itself or to transfer the case to another court.
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> (b) There is a difficult question of law with respect to the applicability of the National Alcoholic Drinks Control Act in view of the County Alcoholic Drinks Control Act.
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> (c) There is a difficult question of law as to whether the alcoholic drink called **"Machore"** is criminalized.

3. The application is supported by the affidavit of the applicant. In addition to the above grounds he depones that he is apprehensive that the trial court has already formed an opinion that he is guilty as charged and he therefore cannot get a fair trial. That this is strengthened by the

harshness of the trial court towards him. The trial court refused to recall prosecution witnesses who testified in the absence of his advocate who had requested the court in writing to adjourn the hearing as he was engaged in Anti-corruption case at Eldoret. That the court was focused more on speedy conclusion of the case than in the fairness thereof. The trial Magistrate refused to recuse itself.

4. The respondent opposed the application and filed a replying affidavit sworn by Brenda N. Nandwa.

5. In response, the respondent states that the applicant does not have any reasonable grounds as provided for under Section 81 of the Criminal Procedure Code to warrant transfer of case. That the applicant should have exhausted all avenues before moving this court for an order of transfer. That he would have invoked ***Section 79 of the Criminal Procedure Code*** which provides for the proper procedure towards transfer since Senior Principal Magistrate's Court at Runyenjes has another Court in Runyenjes before resorting to this Honourable Court.

6. That the true test is whether a reasonable apprehension existed in the mind of the accused from incidents which had occurred and the availability of witnesses if the matter is transferred will prove difficult as they are all from Runyenjes.

7. The court, Justice Muchemi, issued a temporary order of stay of proceedings in Runyenjes Criminal case No. 412/2015 pending the hearing and determination of this application.

8. The parties filed submissions. For the applicant, it was submitted that the applicant is charged with four counts before the trial court as follows:-

> **a. In Count 1 he was charged with dealing with alcoholic drinks without a licence contrary to *Section 7(1)(b) as read with Section 62 of the Alcoholic Drinks Control Act No. 4 of 2010* the particulars whereof being that on 15th July, 2015 at about 16.00 hours at Ena Market within Embu County the accused was found in possession of alcoholic drinks namely "machore" to wit 200 litres for sale in his house without a licence and which does not conform to the prescribed standard and requirement of this Act.**
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> **b. In Count II he was charged with packing alcoholic drinks in sachets contrary to *Section 31(1) as read with Section 31(3) of the Alcoholic Drinks Control Act No. 4 of 2010* the particulars whereof being that on 15th July, 2015 at about 16.00 hours at Ena market within Embu County was found having alcoholic drinks to wit "Machore" in polythene sachets held in five crates.**
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> **c. In Count III he is charged with operating food premise without a health licence contrary to the Food Hygiene Regulations under the Food, Drugs and Chemical Substances Act, Cap 254 Laws of Kenya the particulars whereof being that on 15th July, 2015 at about 16.00 hours at Ena Market within Embu County was found operating an alcoholic drinks premises without a health licence.**
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> **d. In Count V, he is charged with preparing food under a sanitary condition contrary to *Section 7 as read with Section 36(1) of the Food, Drugs and Chemical Substances Act, Cap 254 Laws of Kenya* the particulars whereof being that on 15th July, 2015 at about 16.00 hours at Ena Market within Embu County was found operating having prepared and packed alcoholic drinks under insanitary conditions.**

9. On 13/3/2017 the applicant's counsel was before Eldoret Court. The applicant applied for adjournment on the same basis. The trial court dismissed the application and proceeded to hear PW2, PW-3-, PW-4- & PW5. The applicant did not cross-examine the witnesses. The applicant applied to recall the witnesses but the trial Magistrate dismissed the application.

10. The applicant submits that the trial was unfair and there was denial of access to justice. He submits that under **Article 25(c) of the Constitution** the right to fair trial cannot be limited. **Article 50(2)(g) & (k) of the Constitution** right to fair trial includes the right to representation by an Advocate and to challenge evidence. The court had power to recall witnesses under **Section 150 of the Criminal Procedure Code** and **Section 146(4) of the Evidence Act** but did not give reasons for refusing to recall witnesses. That the trial Magistrate had no basis to find that the application for adjournment was a delaying tactic. He relies on the case of **Joseph Ndungu Kagiri –v- R 2016 eKLR** where Justice Mativo stated:-

> ***"In my considered opinion, the speedy trial provided for in our constitution is not 'a rushed and unconsidered justice'. No. It cannot be nor can it be so construed under any circumstances. In my considered view, our constitution provides for a speedy trial but it anticipates a trial with two sides, which must as of necessity exhibit the best antidote to both sides. It must demonstrate a criminal justice system that is not too fast, and not too slow, but just right. [11] To me that is the proper meaning of the phrase 'to have the trial begin and conclude without unreasonable delay.' The drafters of the constitution never anticipated a trial that is too speedy to the detriment of an accused person. I reiterate that the flip side of the maxim "justice delayed is justice denied …." Is a rushed, unconsidered, unprocedural and unconstitutional trial that undermines sound criminal justice system." The effect is that such a trial is a sham and has absolutely no place in our constitutionalism.***

11. The applicant submits that by refusing to recall the witnesses on the basis that only the prosecution is permitted to re-open its case, the trial court disseminated against the applicant and denied him the benefit of **Section 150 of CPC** in contravention of **Article 27(1) and Article 259(1) of the Constitution.**

12. He also relies on **R –v- Salim Mohamed (2016) eKLR.** He submits that the applicant was denied a fair trial.

13. The applicant submits that he is apprehensive that he will not get fair trial. The trial court has convicted other accused person and must have formed an opinion that the witnesses are truthful. That there is an issue as to whether the applicant should have been charged under

Alcoholic Drinks Control Act 2010 or under **Embu county Alcoholic Drinks Control Act.**

14. He relies on the case of **Kinyatti –v- Republic (1994) eKLR** Court of Appeal where it was stated:-

> ***Where the apprehension in the mind of the accused that he may not have a fair and impartial trial is of a reasonable character, there, notwithstanding that there maybe no real bias in the matter, the facts of incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer." The Patel case has withstood the test of time and in our view is still the law on the question of the transfer of a criminal case on application by the accused person. It is not the strength of the ground as stated in the Indian Code of Criminal Procedure 1908 by Sir HT Prinsep and Sir John Woodroffe that weighs with a court but the reasonableness of the accused person's apprehension. If the accused shows that his apprehension is reasonable then he has set out a clear case. Mr. Chunga accepted the test laid down in Hashimu.***
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> ***The grounds given by the Chief Magistrate in refusing a transfer were far from the established test. It was immaterial whether there would result chaos in the administration of courts; it was further irrelevant whether the Chief Magistrate dealt with many similar cases involving the same witnesses and whether he was sufficiently experienced so as to decide the case dispassionately. The test was whether the apprehension in the mind of the applicant/accused that he may not have a fair and impartial trial before the Chief Magistrate was of a reasonable character regardless of the fact that there may be no unfair or partial biased trial in the matter. That was the test the trial Magistrate ought to have applied.***

15. That Rule -5- Judicial Service Code of Conduct and Ethics requires a Judicial Officer to disqualify himself/herself where impartiality may reasonably be questioned.

16. For the respondent it is submitted that **Section 81(1) of the Criminal Procedure Code** is the law relating to transfer of cases. They submit that the application is a delaying tactic. The applicant's apprehensions are not well explained and he has not demonstrated how the trial Magistrate is biased. The respondents relies on the **Case of Maina Kinyatti –v- R (1984) eKLR** where the Court of Appeal considered the test to be applied. They also rely on **John Brown Shilenge –v- R Nairobi Cr. Appeal No. 180/80** where it was stated, ***'mere allegations will not suffice there must be reasonable grounds for the allegations.'*** **Tilmaini –v- R 1972 E.A 441** where it was stated-

> ***"In considering the possibility of bias, it is not the mind of the Judge which is considered but the impression given to a reasonable person".***

17. The respondent also relies on **Kamande & 3 Others –v- Republic 2014 eKLR** where it was stated – ***"the court will assess whether the applicants apprehension was reasonable and founded on sufficient material ------".***

18. That there was no application for recusal. The application is incompetent by dint of **Section 79 of the Criminal Procedure Code.** That the **Alcoholic Drinks Control Act** is not in conflict with County **Alcoholic Drinks Control Act.**

19. I have considered the application and the submissions. The issue which arises for determination is the transfer of the suit. The law that applies to transfer of cases is in ***Section 81 of the Criminal Procedure*** Code:-

> **"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."**

20. The principal consideration is whether the applicant has a reasonable apprehension that a fair trial and impartial trial cannot be had. This is the test which has been set by the Court of Appeal in the case of **Maina Kinyatti –v- Republic** which was referred to by the applicant and which I have quoted above. It is the reasonableness of the accused person's apprehension that is relevant and if the applicant shows that his apprehension is reasonable, he has established a case for the application to be allowed.

21. I must consider the facts to determine whether there is reason for the applicant to have reasonable apprehension. The reasonable apprehension must be founded on some sound grounds but not on mere allegations. This is because the courts have a duty to ensure that there is trust in the integrity and independence of the courts and the Judiciary. It is submitted that the applicant was denied adjournment the lawyer had written to court to say he could not attend as he was attending court at Eldoret.

22. As can be seen from the proceedings, on 03/10/2016, the court granted the last adjournment to both the prosecution and defence. The matter proceeded on 27/10/2016 and on 23/01/2017 the prosecution was granted a last adjournment and was ordered to avail all witnesses on 13/03/2017. However, on the said date the defence counsel was not available and had written a letter that he is at Eldoret. The trial court in its ruling stated that that the defence counsel did not bother to inform the prosecution not to come with witnesses and that granting another adjournment will be prejudicial to the prosecution and the court due to the heavy witness expenses which will be incurred.

23. In this case, although the defence counsel should have duly informed the prosecution of his unavailability, to allow the case to proceed without the accused being represented was detrimental to him. In addition, though the trial court had held that the parties were given their last adjournment on 03/10/2016, it proceeded to give the prosecution another adjournment on 23/01/2017 but failed to give the defence another adjournment. Therefore, this could result in the apprehension of the accused person that in his mind that he may not have a fair and impartial trial before the trial. This is the test which the court has to apply. If he has a reasonable apprehension that he would not get a fair and impartial trial and demonstrates this with facts arising from the trial, the court will allow his application.

24. The constitution guarantees the right to fair trial. It is a right that cannot be limited. It is a right which as stated by Justice Mativo, in **Joseph Ndungu Kagiri –v- Republic** which is placed on ***'a higher pedestal'.*** This is because an accused person is presumed innocent and should be accorded the rights under **Article 50.** The trial court must be seen to be fair to both sides and demonstrate a balanced role as an

impartial arbiter. In criminal trial the only way to challenge evidence is by cross-examination which is wide and not limited to matters which the witness has testified. The court exercises wide discretion. The court must be seen to exercise that discretion fairly to ensure that the parties get a fair trial. ***Section 150 of the Criminal Procedure Code*** in my view gives court power to summon and call witness or examine any person in attendance or recall and re-examine. The court has discretion on an application under the section to allow the recall of witnesses for cross-examination and/or re-examination or even examination in Chief. It would be exercising the discretion fairly.

25. The applicant had an Advocate who was not present when the key witnesses testified. It would have been fair for the court to allow the application to have the witnesses to be recalled for the purpose of cross-examination. The holding by the trial court that only the prosecution can re-call witnesses was made in error. **Section 146(4) of the Evidence Act** provides:-

> ***"(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively."***

26. The trial court discriminated against the applicant by denying him the benefit of ***Section 150 Criminal Procedure Code and Section 146 of the Evidence Act.***

27. The trial court was over protective to the prosecution witnesses by stating that – ***"adjournment will be very prejudicial to the prosecution and to the court due to heavy witness expenses which will be incurred."***

28. Such expenses should not be allowed to stand on the way to doing justice. The justice must not only be done but seen to be done. The court must do justice at all times. Expeditious disposal of cases and the quest to save judicial time does not mean that a trial be rushed and rights be denied. The court must guard against violation of right and ensure that the case is disposed of without unreasonable delay. It was wrong for the trial Magistrate to deny the applicant an adjournment when a good reason was advanced and by failing to allow the applicant to have the witnesses recalled for cross-examination. The trial court handled similar cases where the same witnesses had testified and they ended up in convictions.

29. The applicants apprehensions have been well explained. The circumstances of this case do not show that the application for adjournment and to recall witnesses was meant to delay the case. The trial court had no reason to rush the case. The applicant had not contributed to the delay in conclusion of the case and ought to have been given the right to be represented by an advocate and to recall witnesses. I find that applying the test in the Court of Appeal decision in **Kinyatti –v- Republic (1984) eKLR** that – "***Where the apprehension in the mind of the accused that he may not have a fair and impartial trial is of a reasonable character, there, notwithstanding that there may be no real bias in the matter, the facts of incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer.***"

30. And **Section 81 of the Criminal Procedure Code,** I find that the applicant has made out a case for the transfer of the case from the trial Magistrate's court to any other court with jurisdiction.

31. I order that Runyenjes Criminal Case No. 412/2015 shall be transferred to the Chief Magistrate's Court at Embu for hearing and determination by the Chief Magistrate or a Magistrate with jurisdiction.

Dated at Kerugoya this 29th Day of July 2019.

L. W. GITARI

JUDGE