



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NANYUKI**

**MISC CRIMINAL APPLICATION NO 1 OF 2019**

**CHARLES MAGUTA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

1. The Applicant herein, **CHARLES MAGUTA**, is the first accused is *Nanyuki CM Criminal Case No 1085 of 2018* where he and his co-accused are facing two counts of robbery with violence contrary to section 296 (2) of the Penal Code. Their trial commenced before the **Hon Njeri Thuku, PM**. After one of the complainants testified the Applicant applied to this court for transfer of his trial to another court. He informed this court that he did not know if his co-accused has similarly applied to this court.

2. The grounds for the Applicant seeking transfer of this trial, as they appear in his supporting affidavit, are -

- a. That the trial court has severally adjourned the trial “without giving clear reasons”.
- b. That the trial court failed to give the applicant adequate time to cross-examine PW 1.
- c. That the trial court interrupted the Applicant several times during his cross-examination of PW 1.
- d. And that therefore the trial Court is prejudiced against him, and he is apprehensive that he will not get a fair and impartial hearing before it.

3. The Republic has opposed the application by a relying affidavit filed on 05/04/2019. In that affidavit the learned prosecution counsel points out that the record of the trial court does not support the claims of the Applicant; and that on the contrary that record shows that the trial court has been impartial and has properly conducted the trial so far.

4. I have considered the submissions of the Applicant and those of the learned prosecution counsel. I have also perused the record of the trial court.

5. **Section 81(1) (a) and (e)(ii)** of the *Criminal Procedure Code, Cap 75* provides -

“**81. (1) Whenever it is made to appear to the High Court -**

**a. that a fair and impartial trial cannot be had in any criminal court subordinate thereto; or**

.....

.....

**e. that such an order is expedient for the ends of justice or is required by any provision of this Code, it may order –**

**i. ....**

**ii. that a particular criminal case or class of cases be transferred from a criminal court subordinate to its**

**authority to any other criminal court of equal or superior jurisdiction;**

**iii. ....”**

6. So, under the above provisions, this court may order transfer of a criminal trial from one subordinate court to another of equal or superior jurisdiction whenever it is made to appear that a fair and impartial trial cannot be had in the trial court, or that such an order is expedient for the ends of justice, or is required by any provision of the Criminal Procedure Code.

7. The Applicant has alleged that the trial court has severally adjourned his and his co-accused's trial “**without giving clear reasons**” for such adjournments; that the trial court failed to give him adequate time to cross-examine PW1; that the trial court interrupted him several times during his cross-examination of PW1; and that therefore the trial court is prejudiced against him and he fears that he will not get a fair and impartial trial before it.

#### **Adjournments**

8. The record of the trial court discloses clearly the reasons for each adjournment. Examples of these reasons are that the trial court had several other trials which needed to be prioritized; and that the trial court was attending a **Court Users Committee** meeting in the afternoon. I cannot find in the trial court's record any justification for this complaint.

#### **Adequate time to cross-examine**

9. The record of the trial court shows that the Applicant's co-accused cross-examined PW1 at length. By contrast the Applicant only appears to have asked PW1 about nine (9) questions. It does not make sense that the trial court would restrict the Applicant in his cross-examination of PW1 and then immediately thereafter allow his co-accused to cross-examine the witness at length. I do not believe the Applicant's complaint that he was not accorded adequate time to cross-examine PW1.

#### **Interruption by the trial court**

10. Beyond the Applicant's complaint in this regard, there is nothing else, not even an affidavit by his co-accused or someone else who was present in court. And having said that, it must be noted that a trial court has certain powers regarding examination of witnesses. See for instance **section 159** of the **Evidence Act, Cap 80** which provides -

**“159. The court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquires may have some bearing on the questions before the court, unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed.”**

11. And **section 160** of the same Act provides -

**“160. The court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the court needlessly offensive in form.”**

12. This court notes that PW1 was a child aged 15 years. Trial courts would normally have a particular responsibility to be protective of young and vulnerable witnesses in order that they may be able to properly and usefully testify.

13. After considering all matters placed before this court, I am not satisfied that the Applicant has demonstrated that he will not have a fair and impartial trial in the court currently trying him and his co-accused. I am also not otherwise satisfied that an order for transfer of his trial is expedient for the ends of justice. His application is bereft of merit and is hereby dismissed. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 22<sup>nd</sup> DAY OF JULY 2019**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 25<sup>th</sup> DAY OF JULY 2019**