



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**MISC. CRIMINAL APPLICATION NO. 7 OF 2017**

**ERICK MUKUNDI NDWIGA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

1. In his undated application filed on 11/05/2017, the applicant seeks for transfer of his case Runyenjes Criminal Case No. 88 of 2017 from Runyenjes Senior Principal Magistrate Court to another court of competent jurisdiction. It is alleged that there is exists a conspiracy between the trial magistrate and the prosecution against the applicant to subject him to an unfair trial. It is further stated that in pursuance to the said conspiracy, his co-accused one Stephen Maina Mbogo was released under Section 204 of the Criminal Procedure Code. The applicant states that he has reason to believes that it was his co-accused who was the one found in possession of the stolen mobile phone but was conveniently made a prosecution witness.
2. The applicant further states that the court declined to review his bond terms which are unaffordable and that any time he raises complaints, the court does not address them.
3. The application was opposed by the respondent relying on the affidavit of Beatrice Manyal the prosecution counsel. It is deposed that the applicant has not demonstrated bias on the part of the trial magistrate and the prosecution. There is no material to show that the applicant has a reasonable apprehension of bias in the event that trial proceeds before Runyenjes court. According to the respondent, there is not a single circumstance shown to justify transfer of the case.
4. The respondent further states that the applicant alleges delay in his case which is not true in that the plea was taken in 2017 and hearing commenced in the same year.
5. It is further deposed that the co-accused is still an accused and has not been discharged from the criminal proceedings under Section 204 of the CPC as alleged.
6. The applicant and his co-accused Stephen Mwangi Mbogo face two counts in Criminal Case No. 88 of 2017. In count 1, the accused persons are charged with robbery with violence contrary to Section 296(2) of the Penal Code. The applicant faces an alternative charge of handling stolen property.
7. In count II the two accused are jointly charged with escaping from lawful custody contrary to Section 36 of the Penal Code. A plea of not guilty was entered for both accused persons in respect of all the charges.
8. As for bail terms, the respondent argues that the applicant has made no attempt to have the bond terms reviewed and cannot blame an one but himself. As for transfer of the case the applicant has failed to satisfy the requirements of Section 81 of the Criminal Procedure Code and his application should be dismissed.
9. I have perused the court record which shows that the plea was taken on 1/03/2017 whereas the applicant pleaded not guilty to the charges. The two accused persons were granted bail on the date of the plea to be released on bond of Kshs.500,000/= with one surety of a similar amount.
10. At the commencement of the trial, the applicant requested the court for legal representation and was provided with a counsel through the *pro bono* scheme. The counsel appeared in court on the first hearing date and sought for adjournment because the date was not convenient to him. The hearing was adjourned to 18/05/2017 when the applicant refused to attend court. The prosecutor informed the court that the accused refused to be produced in court insisting that the case was for hearing the next day.
11. The 2<sup>nd</sup> accused, the prosecutor and Mr. Guantai for the 1<sup>st</sup> accused were all ready to proceed with the hearing on that date but the case had to be adjourned in the absence of the applicant. On a subsequent hearing, the applicant attended court and two witnesses were heard.

12. The applicant subsequently filed this application seeking for transfer of the criminal case from Runyenjes court. Henceforth, the applicant became non-available for hearing before Runyenjes court although this court had not granted any order for stay of the criminal proceedings. This is clear in the proceedings of the court.

13. This court called for proceedings of the criminal case which I have perused carefully. I do not find anything to show that the applicant applied for review of the bond terms before the trial magistrate. He cannot therefore accuse the court of failing to review bond terms.

14. If the applicant was unable to meet the terms and conditions of the bond, he had an obligation to apply for review. I find no blame attributable to the court herein.

15. The applicant has not demonstrated any bias on the part of the magistrate nor shown any conspiracy to deny him justice on part of the learned magistrate and the court prosecutor. The proceedings do not support any reasonable apprehension that would lead to partiality on part of the magistrate who was kind enough to accord the applicant legal representation on *pro bono* basis.

16. The allegations of conspiracy and bias are wild and designed to give this court an impression that the accused will not be given a fair trial at Runyenjes court. It is dishonest of the applicant to make such allegations knowing very well that he has no evidence to support them.

17. On allegations of withdrawal of the case against the co-accused, the record does not bear any evidence to that effect. The name of the 2<sup>nd</sup> accused Anthony Maina Mbogo appears on the charge sheet jointly charged with the applicant. No charge sheet or proceedings to support this allegation were produced.

18. Even assuming that the prosecution had withdrawn the charges against one of the of the accused persons, the intervention is allowed by the law under Article 157(6) of the Constitution. The Directorate of Public Prosecutions (DPP) has powers to institute and to discontinue criminal proceedings against any person as well as to take over and continue criminal proceedings at any stage.

19. If the DPP decides to withdraw criminal charges against any suspect, it is within the powers of his office to do so provided he is guided by the evidence before him and the law. This power is partly replicated under Section 87 of the Criminal Procedure Code which allows withdrawal of any case before any final order has been made and with the consent of the court.

20. The applicant cited Section 204 of the Criminal Procedure Code as having been used by the prosecutor to withdraw the case. This section allows a complainant to withdraw a complaint before the court but the provision is not available for the prosecutor. The court record does not show that the complainant ever withdrew the complaint against any person as alleged rendering this allegation devoid of any factual or legal basis.

21. It was also alleged that there has been delay in this case and that it was a case of 2015. The proceedings show that this case was registered in court on 1/03/2017 and the court took plea and fixed a hearing date the same day. In this application, the applicant states that he is complaining about Runyenjes Criminal Case No. 88 of 2017 whose proceedings do not support his allegations of delay.

22. In fact, the case was adjourned the first time because the applicant refused to be produced before the court and subsequently because he had filed this application. I find no evidence of delay in this case caused by the court or the prosecutor as alleged.

23. Section 81 of the Criminal Procedure Code empowers this court to make orders for transfer of a criminal case from one court to another. The reasons given for such transfer are several including the one relied on by the applicant in Section 81(1)(a) regarding a fair and impartial trial.

24. I have carefully considered the representations made before me. It is my finding that the applicant has not shown that he is likely to be denied a fair and impartial trial before the Runyenjes Senior Principal Magistrate Court.

25. I find this application lacking merit and it is hereby dismissed.

26. It is hereby so ordered.

**DATED, DELIVERED AND SIGNED AT EMBU THIS 17TH DAY OF APRIL, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Applicant present in person**

**Mr. Obongi for respondent**