



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**MISC. CR. APPLICATION NO. 66 OF 2018.**

**J I M.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING.**

1. J I M, hereafter the Applicant made the present application by way of Notice of Motion dated 15<sup>th</sup> January, 2018. In it he prayed that the court transfers Chief Magistrate's Criminal Case No. 1771 of 2014 to any other court within Milimani Law Courts. The grounds upon which the application was made were that while the Applicant pleaded "Not Guilty" to the offence of Incest contrary to Section 20(1) of the Sexual Offences Act he feels that his rights to a fair trial had been infringed by the current trial magistrate. That he made an application dated 11<sup>th</sup> September, 2017 to the Chief Magistrate, Milimani and received a reply urging him to appeal the current ruling he was dissatisfied with as he could not intervene with decisions made by courts within his jurisdiction.

2. The application is supported by an affidavit sworn by the Applicant in which he deposes that the trial court had violated his rights under Articles 25 and 50(2)(a),(c) and (j) of the Constitution as the he was not accorded a fair trial. That after the prosecution closed its case he requested the trial court to allow him to submit both oral and written submissions but the court denied him the chance and placed him on his defence. Further, that the proceedings were initially interpreted in the Kamba language which he understands better and later he was asked to proceed in Kiswahili which violated his right under Article 50(2)(m) of the Constitution. That he also requested to be supplied with documentary evidence by the prosecution but he was denied the same. That every time he is engaged in cross-examination the court would intervene and ask him to ask relevant questions. Further that the court violated his rights under Article 49(1)(m) of the Constitution when it denied his various attempts to have the bond terms varied. He concluded by urging the court to have the matter transferred to another court within Milimani law Courts and order that the witnesses be recalled particularly one key witness F. C. He also attached a copy of the reply he received from the Chief magistrate, Milimani Law Courts dated 11<sup>th</sup> September, 2017.

3. The application was canvassed before me on 10<sup>th</sup> April, 2018 with the Applicant representing himself whilst Ms. Sigei acted for the Respondent. He submitted that he was asking for the transfer of his case from the trial court as it was conducted in Kiswahili while he only properly understands Kamba language. Further, that he was not supplied with witness statements and that certain witnesses were locked outside the court. In reply, Ms. Sigei submitted that the offer to pay cash bail of Kshs. 10,000/- was too low as the Applicant would likely flee.

4. I have accordingly considered the respective submissions. With regard to the bail and bond conditions, the court is satisfied that they are reasonable in the circumstances of the case. They are not stringent but reasonable. The court therefore upholds them.

5. The Applicant also urged the court to transfer the matter to a different trial magistrate as the current magistrate has infringed his right to a fair hearing. He submits that this relates to his right to be supplied with witness statements and the necessary interpretation of the case. The court has perused the trial court file and it is clear that he was supplied with witness statements on 29<sup>th</sup> January, 2015 and therefore this contention is baseless.

6. On the issue of the interpretation of the proceedings, it is clear that since the Appellant took plea on 11<sup>th</sup> December, 2014 there had been interpretation available to him from the language of the court to the Kamba language. This interpretation was in place when witnesses testified before Hon. Gandani. However, when the matter was taken over by Hon. Onkwani the interpretation no longer continued. It is further clear that there does not appear that the Applicant informed the court that he was not conversant with the language of the court. In particular, the evidence of PW5 taken on 12<sup>th</sup> July 2017 was taken without interpretation which clearly infringed his right to a fair trial. This does not however point to bias on the part of the trial magistrate which would require this court to order that she recuses herself. The drawback that it will cost the trial is the likelihood of the trial being declared a mistrial should the Applicant be convicted and moves to the High Court on appeal. This court would advise the trial magistrate to expunge her own proceedings where this injustice has been occasioned. This however depends on the stage at which the trial has reached and the independent decision of the learned trial magistrate. The net effect of so doing will be to preserve the sanctity of the trial.

7. In sum, the request for transfer of the file to another magistrate is also declined. It is so ordered.

**DATED and DELIVERED this 17<sup>th</sup> day of April, 2018**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Applicant present in person.*
2. *Miss Sigei for the Respondent.*