



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CRIMINAL APPLICATION NO. 22 OF 2017

VINCENT MADOYA AFANDE.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

CHIEF MAGISTRATE'S COURT AT EMBU.....2ND RESPONDENT

R U L I N G

1. The applicant in his notice of motion dated 1/11/2017 seeks for orders that his case before Embu Chief Magistrate Criminal Case No. 435 of 2017 be transferred to any other court of competent jurisdiction for hearing and determination.
2. It is deposed in his supporting affidavit that before he was charged in Criminal case No. 1144 of 2016, he was remanded in custody for seven days on an application by the police. The order to remand him for further investigations was made by Hon. Nyakundi Senior Resident Magistrate. He pleaded not guilty when he appeared for plea but was convicted by Hon. R.O. Oigara Principal Magistrate.
3. Later on the High Court reviewed the decision of the lower court and ordered that the applicant be charged afresh. He states that he was not involved in the High Court revision application by the 1st respondent.
4. Upon being re-arrested, the applicant states that he was charged in Criminal Case No. 435 of 2017. He accused the trial magistrate Hon. Ndengeri Resident Magistrate of refusing to record his plea of autrefois convict and refused to prove any details of the revision application in the High Court which quashed the proceedings of the first criminal case. He contends that he is advised by his advocate that unless he is allowed to defend himself in the High Court revision application, the charges in the current criminal case will amount to a travesty of justice.
5. The applicant avers that the terms for bond of Kshs.800,000/= with two sureties for a misdemeanor was malicious and punitive for the magistrate commented that he was not entitled to bond and that the court was doing him a favour.
6. The applicant further states that some of the prosecution witnesses include one V.O. Nyakundi and other staff from the station which strengthens his case that justice will not be done if the case is heard in Embu.
7. The 1st respondent in its replying sworn by prosecution counsel Brenda Nandwa opposed the application. It was deposed that the application to remand the applicant with a view of completing investigation was made under Article 49(1) (f), (g) and (h) of the Constitution and did not violate his rights as alleged.
8. As for Criminal Case No. 1144 of 2016, the counsel states that it was fixed for hearing before Embu Court No. 1 but was diverted to Court No. 2 where plea was changed, and the applicant given a lenient sentence of three months suspended sentence despite the seriousness of the offence. The High Court revised the proceedings to correct the irregularities and illegalities in exercise of its supervisory jurisdiction under the law.
9. It is contended further that the grounds relied on in this application do not pass the test of Section 81 of the Criminal Procedure Code so as to justify orders for transfer. Further that the trial in Criminal Case No. 435 of 2017 does not amount to double jeopardy as claimed by the applicant since the orders directing so were lawfully issued by a competent court.
10. The 2nd respondent opposed the application on grounds that the first Criminal case No. 1144 of 2016 was fixed before Court No. 1. The applicant failed to appear in court on the 19/12/2016 in the morning early hours. His file was later sneaked in Court No. 2 where he changed his plea and was given a lenient sentence by the trial magistrate who never inquired of the applicant's whereabouts that morning when he was supposed to be before the trial court.
11. The 2nd respondent states that the applicant did forum shopping which landed him in court 2 and later led to disciplinary action being

taken against the court staff who participated in the uncalled for and irregular act.

12. The 2nd respondent states that the proceedings before the said court No. 2 were riddled with irregularities which were lawfully corrected in the revision before the High Court under Section 362 of the Criminal Procedure Code. He further states that the trial court enjoys decisional independence and that there is no good reason for transfer of the case to another court.

13. In his supplementary affidavit, the applicant denies that he did forum shopping in criminal case No.1144 of 2016 and contends that there were no irregularities in the case as alleged by the respondents. He further states that he was not in control of the movement of his file in the court registry or in control of the sentencing which is a discretion of the trial court.

14. Two issues arise in this application as follows:-

(1) Whether the applicant is unlikely to get justice if he is tried in Embu court station in Criminal Case No. 435 of 2017.

(2) Whether the applicant has established his case for transfer of the criminal case to another court outside Embu.

15. From the pleadings, it is not in dispute that the applicant was charged in Embu criminal case No. 1144 of 2016 with the offence of pretending to be with an advocate of the High Court contrary to Section 33 as read with Section 85(1) of the Advocates Act, Cap. 116. It is not in dispute that his case was fixed before Court No. 1 Embu for hearing. It was alleged by the 2nd respondent and not denied that the court file was mysteriously taken to Court No. 2 on 19/12/2016 when the accused was supposed to have appeared in Court No. 1. The applicant states that he changed his plea on that day before Court No. 2 and he was sentenced.

16. The 2nd respondent avers that the mysterious movement of the file and led to disciplinary action being taken against some judicial staff who may have been used to ensure the applicant appeared before the court of his choice. It is not in dispute that the proceedings were later revised under Section 362 of the Criminal Procedure Code and it was directed that the applicant be charged afresh.

17. The applicant takes issue with the respondents that he was not served with the application for revision in which he needed to defend himself. A few observations may be made herein from the foregoing facts contained in the pleadings.

18. Firstly, that the applicant who failed to appear before the trial court and had his file diverted to another court was thought to have been involved in forum shopping assisted by some judicial staff.

19. This notwithstanding, the High Court has supervisory jurisdiction over all subordinate courts and tribunals. The court may call for a file or have it referred to it for exercise of the said powers. In this particular case, the applicant had annexed proceedings of Criminal Case No. 114 of 2016 which are clear that the order for referral of the file to the High Court was made by the Chief Magistrate Hon. M. N. Gicheru.

20. This action was lawful and within the provisions of Article 165 of the Constitution and Sections 362 and 364 of the Criminal Procedure Code. It is the the High Court that quashed the conviction and sentence and ordered fresh trial. With this background, the trial in criminal case No. 435 of 2017 cannot be double jeopardy for it was legally instituted.

21. The applicant argues that he was not served with the application for revision. He did not annex the High Court proceedings and ruling to this application. Even assuming that he may not have been served with the said application, the applicant was at liberty to apply for the proceedings and challenge the orders made. He did not annex any correspondence to show that he made such an application and it was refused.

22. However, since the applicant is only challenging the impartiality of the magistrate's court to conduct his trial, this is a subject for another day.

23. The proceedings for the miscellaneous criminal application for extension of time to complete investigations were not annexed. However, I find the explanation by the 1st respondent satisfactory that the orders were lawfully obtained under the provisions of Article 49(1) of the Constitution. The applicant has not demonstrated bad faith on part of the 1st respondent or on the part of the magistrate who issued the orders.

24. Bail is within the discretion of the trial judge or magistrate and the terms and conditions may differ depending on the circumstances of each case, on the seriousness and nature of the offence. The record in criminal case No. 435 of 2017 does not support the allegations by the applicant that Hon. Ndengeri made any comment in open court showing bias against the applicant. His counsel addressed the court in a preliminary objection and a well reasoned ruling was made.

25. The bond terms granted were not excessive and were subject to review if the applicant felt he could not afford to comply. The defence counsel later applied for review and the bond terms were reviewed downwards to Kshs.200,000/= with a surety.

26. This application is made under Section 81 of the Criminal Procedure Code which provides:-

(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*

(b) that some question of law of unusual difficulty is likely to arise; or

(c) that a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the offence; or

(d) that an order under this section will tend to the general convenience of the parties or witnesses; 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) that an offence be tried by a court not empowered under the preceding sections of this Part but in other respects competent to try the offence;

(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) that an accused person be committed for trial to itself.

(2) 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.

(3) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Director of Public Prosecutions, be supported by affidavit.

(4) An accused person making any such application shall give to the Director of Public Prosecutions notice in writing of the application, together with a copy of the grounds on which it is made, and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of notice and the hearing of the application.

(5) When an accused person makes any such application, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the costs of the prosecutor.

27. The proceedings show that the trial of the applicant is being conducted by one S.K. Mutai Principal Magistrate. The matter went before Hon. M.N. Gicheru who recused himself on grounds that he was involved in some investigations on alleged forum shopping by the accused. This was done on the honourable magistrate's own volition which was an act of honesty and good faith.

28. Hon. Nyakundi dealt with the miscellaneous criminal application while Hon. Ndengeri took the plea in this case. The magistrates conducted the said proceedings in exercise of their judicial functions. The applicant has not demonstrated any evidence of bias against any of the magistrates.

29. As for Hon. S.K. Mutai the trial magistrate in Criminal Case No. 435 of 2017, the case was fixed before him after Hon. M.N. Gicheru recused himself. The magistrate stated:-

I have asked the accused if he is comfortable with the case proceeding at Embu Law Courts and he says that he does not mind his case proceeding in Court No. 3.

30. The file was then taken to court No. 3 presided over by Hon. S.K. Mutai. The trial commenced and evidence of one witness has been taken. The record does not show that the applicant ever complained before the trial magistrate being biased. This is the magistrate who reviewed his bond considerably and was his choice for trial as shown by the proceedings of 14/06/2017.

31. The said magistrate was never involved in the investigations mentioned by M.N. Gicheru or in the first trial in Criminal Case No. 1144 of 2016. The applicant has not made an application before the magistrate to recuse himself which is his right.

32. The applicant said that Hon. V.O. Nyakundi and other staff in Embu Court whom he did not name are witnesses in the case. He only annexed the statement of Hon. Nyakundi to his application.

33. I agree with the applicant that Hon. Nyakundi being a witness should not conduct the trial against the applicant. He cannot of course play the role of the trial magistrate and witness in the same case. The same case applies to Hon. Gicheru who has already removed himself for a good reason.

34. If I was to take the applicant's word that some other members of staff are witnesses in the case, I would not buy his argument that he will not get justice in any court in Embu. He has not demonstrated how the members of staff are likely to influence the trial magistrate whose court is independent of any administrative investigations that may be going on or have already taken place. The outcome of the criminal trial will all depend on the evidence adduced in support of the charges.

35. I reach a conclusion that this application does not pass the test under Section 81 of the Criminal Procedure Code. I find that it lacks merit and it is accordingly dismissed.

36. It is hereby so ordered.

DATED, DELIVERED AND SIGNED AT EMBU THIS 30TH DAY OF MAY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Kibunja for Applicant

Ms. Mate for 1st respondent