



**REPUBLIC OF KENYA**

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

**MISC. CRIMINAL APPLICATION NO. 7 OF 2018**

**GODFREY OJWANG OTIENDE.....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

1. The Applicant herein, **Godfrey Ojwang Otiende**, is a Tanzanian citizen who was charged with the offence of defilement before the Senior Resident Magistrate's Court at Rongo in **Criminal Case No. 13 of 2017** (hereinafter referred to as '**the Criminal Case**') on 22/09/2017. He faced an alternative count of committing an indecent act with a minor. The applicant denied both counts and a trial was ordered. He was supplied with copies of the charge sheet, P3 Form and the statements before the trial began.

2. The trial set off on 23/11/2017 where the applicant indicated to the court that he was not feeling well but will endeavor to proceed. The complainant was examined-in-chief by the prosecution, but the applicant could not cross-examine her due to a serious headache. The court ordered that the applicant be taken to hospital and that the criminal case was to proceed once the applicant returned. When the applicant returned from hospital he informed the court that he was still unfit to proceed, and the hearing was adjourned to the following day.

3. Come 24/11/2017 the applicant informed the court that he was still unwell, but he could attempt to cross-examine the complainant. The applicant ended up cross-examining the complainant and three other witnesses before he sought for an adjournment citing the recurrence of the headache. The hearing was adjourned to 01/12/2017 where the last two prosecution witnesses testified and the applicant cross-examined them. The prosecution then closed its case and vide a ruling delivered on the same day the applicant was found with a case to answer and he was put on his defence. He elected to give a sworn statement and to call one witness. He however sought for time to prepare for the defense. The defence hearing was set for 15/12/2017.

4. The matter did not proceed as scheduled and on 15/01/2018 the applicant prayed that the matter does start *de novo* and that he wanted to formally apply to the High Court for such an order. The trial court allowed the applicant to file the necessary application before this Court and produce such evidence otherwise the defence hearing was set for 15/02/2018. The trial court thereafter stayed the hearing on its own motion pending the outcome of the application before the High Court.

5. On 14/02/2018 the applicant filed a Notice of Motion before this Court and sought the transfer of the criminal case from Rongo Court to any other court within Migori County. The application was supported by the affidavit of the applicant where he deponed that he had requested the trial court to transfer the criminal case from Rongo Court to any other court within the Migori County but in vain. The applicant further deponed that on 23/11/2017 he was subjected to an unfair trial as he was unwell, and the trial court forced him to proceed on with the trial and further that his request to recall the witnesses was declined. He further deponed that he had learnt from reliable sources that the prosecutor had colluded with the complainant to have him convicted on false allegations and that is why the court denied him the opportunity to recall the key witnesses.

6. The application was heard by way of oral submissions where the applicant was unrepresented and basically reiterated the contents of his affidavit. The prosecution urged this Court to be guided by the record.

7. I have intently considered the application and contrary to what the applicant informed the trial court that he intended to make an application before this Court for the trial to start *de novo* he instead filed an application for transfer of the criminal case to another court within the County. There was definitely a very good reason for that change of approach. Simply, the applicant was aware that once the criminal case is transferred to another court then chances of starting afresh were so high.

8. There was also the allegation that the applicant sought to recall the witnesses, but the trial court declined. That contention is however not supported by the record before the trial court. I see that as an attempt by the applicant to mislead this Court with a view of attracting its leniency. Further, the allegation of collusion between the prosecutor and the complainant cannot be said to be a serious issue. That allegation remains hearsay at its best and in any event, it is neither the prosecutor nor the complainant who determine a case but the trial court instead.

9. The applicant has therefore not laid any sound basis for the grant of the orders sought. What comes out of this application is yet another attempt by the applicant to derail and delay the trial. The application is unmerited and is hereby dismissed. The criminal case shall henceforth proceed from where it had reached and on a priority basis. This file is hereby marked as closed.

10. Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 28<sup>th</sup> day of June 2018.**

**A. C. MRIMA**

**JUDGE**

**Ruling delivered in open Court and in the presence of: -**

**Godfrey Ojwang Otiende** the Applicant in person.

**Miss Atieno**, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

**Evelyn Nyauke** – Court Assistant