



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC MISC CR. NO. 291 OF 2017

FREDRICK MUSYOKA MAWEU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. By a Notice of Motion dated 27/11/2017, the Applicant prays for orders:-

1. **THAT** criminal case number 209 of 2017 at Kilungu Law Courts be transferred to Chief Magistrate's Court at Makueni for recall of witnesses, re-examination and re-cross examination respectively in order to accord the applicant fair trial.

2. **THAT** no costs shall be provided for.

2. The same is supported by the following grounds:-

1. **THAT** there had been frequent interference with the file especially on the court dates in order to confuse Applicant for vacation of bond.

2. **THAT** on the 15th November, 2017, the prosecution repeated the scheme by almost failing to present the file before trial Magistrate at Kilungu after complainant had told applicant that with all means the bond must be cancelled.

3. **THAT** the Complainant in more than two occasions had openly uttered to applicant that he has a friend in the court at Kilungu with whom he must ensure cancellation of the applicant's bond.

4. **THAT** the Applicant had spotted visitation of prosecution witnesses at the Complainant's home and on the same day the Complainant went with them to court when it was not a court's date for criminal case number 209 of 2017.

5. **THAT** prior to the institution of allegation, the adjudication officer for Ndiani who is one of the Complainant's witnesses after Applicant's land complaint against Complainant developed friendship with the said Complainant only to end up framing the Applicant in the original case.

6. **THAT** the accused applied for proceedings of part hearing and made payment in original case within knowledge of the connected complainant only to end up with nothing.

7. **THAT** if the case proceeds at Kilungu Law Courts near homes of both Applicant and Complainant the trial shall not be deemed fair to the Applicant.

8. **THAT** the Applicant prays that the case be transferred to Chief Magistrates Court for directions to or any other place convenient to him.

9. **THAT** the Applicant is constitutionally entitled to trial devoid of duress.

10. **THAT** the trial magistrate at Kilungu Law Courts advised on 15th November, 2017 that the Applicant to make application for transfer of the case before High Court at Makueni for relief.

11. **THAT** the Applicant was charged with an offence of threatening to kill which allegations was denied by the Applicant.

12. **THAT** the proceedings in the original case be stayed pending determination of this application.

3. The application is supported by Applicant Affidavit sworn on 27/11/2017 which reiterates the same contents in the grounds in support of the motion. Application relied on same wholly during hearing.
4. The Respondent opposed application during hearing and argued same orally but had not filed any reply to oppose the application.
5. The Applicant is charged with offence of threatening to kill contrary to Section 223 of the Penal Code.
6. Particulars being that on 24th April, 2017 at Kyekalia Village, Ndiani Sub-location, Kithembe Location in Kilungu Sub-county within Makueni County, threatened to kill Jonathan Musumbi Mutio by chasing him with a panga and a hoe.
7. He pleaded not guilty and on 11/07/2017 the matter commenced hearing with the Complainant tendering his testimony.
8. The Applicant did cross-examination and the matter was adjourned to 30/08/2017 on this date the Applicant stated that he was unwell and was on medication.
9. He also stated that he had filed matter in the High Court and wanted time to pursue same.
10. The matter was adjourned to 15/11/2017. On 15/11/2017, the accused was not ready as he sought to have matter to be adjourned as he pursues application to transfer matter from Kilungu Law Courts. The matter was adjourned once more.
11. The main contention by the Applicant is that the complainant has been threatening him that he will interfere with the administration of justice and ensure the Applicant does not enjoy freedom. There is threat to have his bond cancelled according to him from the Complainant.
12. He feels that trial at Kilungu will not be fair due to the Complainant threat thus he seeks change of venue of trial.
13. The Complainant alleged to be a man of huge resources and he is threatening to use same to influence the course of justice. Thus the court is urged to transfer the matter to the Magistrate court at Makueni.
14. The Respondent only response is that the witnesses will be inconvenienced and in any case he can change court from Court 2 which is hearing the matter to Court No. 1.
15. Under **Section 81 of the Criminal Procedure Code** on the other hand provides as follows:-

“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

b) That some question of law of unusual difficulty is likely take 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 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.”

16. I find Article 50 (1) of the Constitution as the pillar on which this application stands, that, “every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.

17. The court finds that the accused has no problem with any specific court nor the prosecutors. He only complains of the perceived influence of the Complainant over the matter.

18. He has not shown any possible interaction between the Complainant and the trial court nor complained to the same court over the allegations by the Complainant that he will be capable to influence the course of justice.

19. The court therefore finds that the threshold for transferring matter from one station to another has not been met. The Applicant must show that fair trial in the Kilungu Law Courts will not be possible in the obtaining circumstances.

20. However to reinforce his faith in the instant matter in trial in Kilungu Law Courts, I will direct matter to be tried by Court No. 1 by Hon. Mayaba or any occupier of that Court No. 1 other than Hon. Muiro and start the matter *denovo*.

SIGNED DATED AND DELIVERED THIS 31ST DAY OF JULY, 2018 IN OPEN COURT.

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C. KARIUKI

JUDGE