



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CRIMINAL APPLICATION NO. 33 OF 2018

SCOLA NAMUNYU IMBITI.....1ST APPLICANT

YOULIAN PETROV STANKOV.....2ND APPLICANT

VERSUS

THE SENIOR PRINCIPAL MAGISTRATE'S

COURT KILIFI.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

JUDGEMENT

1. Scola Namunyu Imbiti, the 1st Applicant and Youlian Petrov Stankov, the 2nd Applicant are the 3rd accused and 4th accused respectively in Kilifi Senior Principal Magistrate's Court Criminal Case No. 1141 of 2011. The 1st accused is Ivan Petrov and the 2nd accused is Milko Kostadinov. The applicants aver that A1 and A2 have since jumped bail.

2. The applicants have brought this application against the Principal Magistrate as the 1st Respondent and the Director of Public Prosecutions as the 2nd Respondent.

3. The applicants through the notice of motion dated 19th March, 2018 pray for an order removing and transferring their case from Honourable Mrs. Juma, Senior Resident Magistrate, Kilifi Law Courts to any other court with competent jurisdiction for hearing and determination. The application is supported by grounds on its face and an affidavit sworn by the 1st Applicant.

4. The applicants' case is that after the prosecution closed its case, the trial magistrate ruled that they had a case to answer and set down the matter for the hearing of the defence case on 5th September, 2016. When they turned up in court on the material day, their file was missing although their case was caused listed.

5. It is the applicants' averment that when their advocate raised the issue with the trial magistrate, she advised him to write a letter so that a skeleton file could be opened. Their advocate complied but no skeleton file was opened. What followed was mention after mention of their matter forcing them to instruct their advocate to take up the issue with the Presiding Judge, Malindi High Court. This was indeed done.

6. It is the applicants' case that the complaint to the Presiding Judge generated a lot of hostility resulting in their being threatened that they would be taken to the Directorate of Criminal Investigations (DCI) at Kilifi. A letter was also written to the police by the Executive Officer of the 1st Respondent. Further, that they were on several occasions threatened with being jailed and accused of having paid for the file to disappear.

7. It is the averment of the applicants that they later learned that the trial magistrate, the court administration and staff were all along aware that the trial magistrate's court assistant was responsible for the disappearance of the file as he had stolen the exhibit in the matter being Kshs. 3 million. Accordingly to the applicants, the disappearance of the file was done with the intention of giving the court assistant an opportunity to refund the money.

8. The applicants aver, that they are likely to be convicted in order to ease the pressure caused by the disappearance of the cash exhibit. In their opinion, an acquittal will result in their demanding for a refund of the exhibit thus making their conviction a better option.

9. The applicants contend that their fundamental rights, particularly the right to a fair trial, as protected by Article 50(1) and (2) of the Constitution have been compromised and will be violated if the trial proceeds before the 1st Respondent. Their view is that they have been subjected to unjustifiable hostility and prejudice and from the manner their trial has been conducted they will not get a fair hearing. They aver that they are apprehensive that the outcome of the matter has already been determined.
10. The applicants complained about the fact that their co-accused who jumped bail have not been arrested and neither have their sureties been summoned to explain their whereabouts. In the applicants' opinion, the failure to aggressively look for their co-accused is aimed at making sure they are not available to claim the cash found on them.
11. Finally, the applicants aver that there is no justification for their being brought all the way from Nairobi when almost all the witnesses come from Nairobi and beyond. They are of the view that it is only just and fair that the matter be moved to another court of competent jurisdiction nearer to the place where the crimes were allegedly committed. Further, that there is no longer any excuse to have the matter heard in Kilifi considering that their co-accused who were allegedly arrested in Kilifi are no longer part of the trial.
12. The application was opposed through an affidavit sworn by Henry Nyabuto Achochi, an advocate with the office of the 2nd Respondent. His averment is that the trial proceeded uninterrupted up to 25th January, 2016 when the prosecution closed its case. All along, Mr. Oundo had appeared for the applicants from the date the plea was taken.
13. It was the averment of Mr. Achochi that on 30th May, 2016 a ruling was delivered in which the trial court placed the applicants on their defence and fixed a hearing date. The court file disappeared thereafter only to be traced on 31st August, 2017.
14. It is the respondents' case that the instant application is an afterthought, an abuse of the court process and only calculated to defeat the spirit of Article 50 of the Constitution which requires expedition of trials. The respondents therefore ask for the dismissal of the application.
15. Counsel for the applicants filed and highlighted submissions which were orally responded to by counsel for the respondents. I will take those submissions into consideration in arriving at my decision.
16. The question is whether the applicants have met the threshold for the grant of the relief they seek.
17. Counsel for the applicants correctly pointed out that the threshold for the grant of the prayer the applicants seek was as set down by the Court of Appeal in **Maina wa Kinyatti v Republic [1984] eKLR; Criminal Appeal No. 60 of 1983 (Nairobi)**. In that case the Court of Appeal held that in order for an accused person to succeed in having his case transferred from one court to another, he must make out a clear case before a transfer of any trial is granted and **"the apprehension in his mind that he will not have a fair and impartial trial before the magistrate from whom he wants the trial transferred must be reasonable."**
18. The grounds upon which an application for transfer of trial can be made are as provided by Section 81(1) of the Criminal Procedure Code, Cap. 75, which I paraphrase as follows:
- a) that a fair and impartial trial cannot be had before the trial court;
 - b) that a question of law of unusual difficulty is likely to arise;
 - c) that the trial needs to be moved to or near the place where the offence occurred;
 - d) that it will be convenient to the parties or witnesses to move the trial; or
 - e) that a transfer is expedient for the ends of justice or is required by a provision of the Criminal Procedure Code.
19. It is not a requirement of the law, as was submitted by counsel for the respondents, that the application should first be made before the trial court. This court may as per sub-section (2) **"act on the report of the lower court, or on the application of a party interested, or on its own initiative."**
20. The applicants gave various reasons cutting across the spectrum of the grounds provided by Section 81. It is therefore only just that I separately consider the reasons given by the applicants for seeking to transfer their trial from Kilifi Law Courts to another venue.
21. The first ground advanced by the applicants is that they reside in Nairobi and they are incurring a lot of financial resources on their travels and accommodation and that of their counsel. Their view is that no prejudice will be occasioned to anybody as the witnesses are said to come from Nairobi and beyond. They also point out that their co-accused who were allegedly arrested in Kilifi have jumped bail therefore rendering the continuation of the trial in Kilifi unnecessary.
22. The applicants' argument that it would be both convenient for them and the witnesses to have the trial move to Nairobi appear reasonable. However, this is a request that has come too late in the day. The prosecution has closed its case and a transfer of the trial will no longer be to the benefit of the prosecution witnesses.
23. The matter is now at the defence stage. For over six years the applicants have patiently and, as they say, 'religiously' attended court. The matter is in the final stages and it now entirely depends on them as it is at the defence stage. Transferring the matter to Nairobi will delay the same as the new magistrate will have to familiarize himself/herself with the file. Depending on the options taken by the applicants in exercise of their rights under Section 200 of the Criminal Procedure Code, there may be need to start the trial afresh. This will not only

delay the matter but also inconvenience the witnesses who have already testified and whose interests, the applicants have disclosed, they want to protect. In the circumstances I find that it is not appropriate to have this matter transferred on the ground that it will be convenient to the witnesses and the parties to have the matter heard in Nairobi.

24. The second ground advanced by the applicants is their apprehension that their trial rights will be violated and their fate is already determined. Is their apprehension reasonable? They claim that the trial magistrate told them that they had paid for the file to disappear and that they would be taken to the DCI, Kilifi. Further, that the Executive Officer had written to the police about the matter.

25. It must be stated that the loss of a court file is a very serious issue that should never be taken lightly. When the disappearance of the court file came to light, the Senior Principal Magistrate, who is the head of Kilifi Law Courts correctly brought the matter to the attention of the police through her letter dated 11th October, 2011. She asked the police to assist in investigating the circumstances surrounding the matter. It is not correct, as alleged by the applicants, that the head of station was reacting to their complaint to the Presiding Judge, Malindi High Court. I say so because the letter addressed to the Presiding Judge, though not dated, has a receipt date stamp of 18th November, 2016 signifying that it was written over one month after the Senior Principal Magistrate had written to the police to assist with investigations. The letter to the police cannot therefore be used as evidence of alleged harassment of the applicants as a result of the letter they wrote to the Presiding Judge. Furthermore, the letter to the police was written by the head of station and not the trial magistrate.

26. It is also noted, that even as the applicants were complaining to the Presiding Judge about the disappearance of their file, the trial magistrate was doing everything possible to try and have the file traced. This is evidenced by the applicants' letter to the Presiding Judge where they indicate that the trial court had summoned the Executive Officer and asked him to explain the whereabouts of the file.

27. There is thus no evidence adduced to show that the trial magistrate threatened the applicants after they wrote to the Presiding Judge.

28. Another reason given by the applicants for their apprehension of a jaundiced trial is their allegation that about Kshs. 3 million that was produced in the trial as an exhibit had been misappropriated by the court assistant. In their opinion, they must be jailed so that the court assistant can be protected as they will no longer be entitled to ask for the release of the money. According to the applicants, their acquittal would result in their asking for release of the exhibit.

29. At the outset it is important to note that the claim that the money produced as evidence has been lost is not supported by any evidence. This fact will not, however, form the basis of my decision on this issue.

30. The key thing to note is that even as the applicants assert that they will reclaim the money if acquitted, they at the same time attribute the lackluster attitude of the police towards arresting their co-accused to the fact that the money was recovered from their co-accused. It is thus apparent that the money was not recovered from the applicants but their co-accused. How then will the applicants, even if acquitted, ask for money not recovered from them? Be that as it may, there is no evidence that the trial magistrate has gone out of her way to help the court assistant. The same magistrate has handled the matter over a long period of time and there has never been any issue about her impartiality.

31. A review of the reasons advanced by the applicants in seeking their trial transferred disclose nothing to support their alleged apprehension of an unfair trial. No evidence has been adduced to support their assertion that their trial rights as protected by the Constitution have been compromised and are likely to be violated by the trial court. In my view, any apprehension that the applicants may have about the fairness or otherwise of their trial is not reasonable. They have thus failed to convince this court that the trial should be transferred to another court. Their application fails in its entirety and the same is dismissed.

Dated, signed and delivered at Malindi this 27th day of July, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT