



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC CRIMINAL APPLICATION 32 OF 2017

(In the matter of An Intended Appeal)

BETWEEN

DAVID KARIRI MBUGUA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

Intended Appeal from conviction and sentence of the Fraudulent false accounting in Magistrate's Court at Chuka in Criminal Case No. 502 of 2017 .

R U L I N G

1. **DAVID KARIRI MBUGUA**, the applicant herein has moved this court under **Section 81** of the **Criminal Procedure Code** through a Notice of Motion dated 21st November, 2017 for the following prayers namely:-

(i) This application be certified urgent.

(ii) That this honourable court be pleased to order transfer of CMCC Criminal Case No. 502 of 2017 from CM's Court Chuka to a competent magistrate's court in Meru County.

(iii) That this court do make any other or better order which it may deem fit to grant in the circumstances.

2. The grounds upon which this application has been made are listed as follows namely:-

(i) That the offences that are subject to Criminal Case No. 502 of 2017 were allegedly committed in Nkubu in Meru County and there are Subordinate Courts in Meru seized with the jurisdiction to hear and determine the case.

(ii) That most of the prosecution witnesses hail from Nkubu hence it would be expedient and convenient for trial to be conducted within Meru County.

(iii) That there is a genuine apprehension by the applicant that he would not get a fair trial before the court in Chuka.

3. The applicant has supported the above grounds with his Supporting Affidavit sworn on 27th November 2017 where he has deposed that the complainant in the charge facing him originate from Nkubu Law Courts where he works. According to him the case facing him is being investigated by D.C.I Nkubu and there are enough competent courts in Meru County that are capable of handling the matter judiciously.

4. The applicant has also further deposed that the Director of Public Prosecution Meru had liaised with the Director of Public Prosecution Chuka with instructions not to register the case in Chuka Law Courts.

5. He also deposed that the complainant has brought the case before a "**friendly**" court and that the trial court did not accord his counsel sufficient time to express himself why he wanted the file transferred to Meru County which is in his contention justified his apprehension that he was not likely to get a fair trial.

6. The application is opposed through a Replying Affidavit sworn by P.C Kipkemboi Langat, the investigating officer, sworn on 13th June, 2018. The investigating officer has deposed that the decision to charge the applicant in Chuka CM's Court was arrived at after communication between the office of DCIO and that of Director of Public Prosecution and that the decision was made in good faith because they have witnesses from Nkubu, Siakago, Meru and Nairobi. In his view Chuka was more central than Tigania.

7. The Respondent has faulted the applicant for being speculative and that he had written several letters complaining about the manner in which investigations were carried out.

8. The investigating officer has further deposed that the applicant's allegations are untrue as they preferred to charge him here in Chuka Law Courts because of its centrality and neutrality given that the offence was committed in Nkubu Law Courts. According to the investigating officer Chuka Law Court is convenient to the accused and witnesses rather than Tigania which is 1 1/2 hours drive from Nkubu as opposed to 40 minutes drive to Chuka. The investigating officer has further deposed that as the office of DCI they have no vested interest in the case and they were only after smooth prosecution free from interference or bias against any party.

9. Mr. Machirah learned counsel for the Respondent submitted that this application is not well grounded as **Section 81 of Criminal Procedure Code** only provides to situations where a party has cogent grounds that a fair trial is not possible. He contends that an applicant has the burden to discharge on a balance of probability that his apprehension is well grounded. He has faulted the applicant's counsel for adducing facts from the bar that the applicant, the complainant is a friend to court 2. It is submitted that no affidavit has made to that effect and therefore the fact is a mere allegation made from the bar.

10. Mr. Machirah has further contended that the decision of where to charge an accused person was made by the office of Director of Public Prosecution in the exercise of its power and mandate and on that basis, the decision could only be challenged by way of Judicial Review and not through a Notice of Motion.

11. This court has considered this application and the grounds upon which it has been made. I have also considered the response advanced by the office of Director of Public Prosecution and the DCI. The court has powers under the cited provisions of **Section 81 of the Criminal Procedure Code** which the applicant herein has invoked. This court indeed has a discretion to transfer a case from one court to another "**whenever it is made to appear..... that a fair and impartial trial cannot be had in any criminal subordinate court.**" The other ground for transfer is where it is more convenient for parties and witnesses to attend court. The overall objective of the transfer is expediency and ends of justice.

12. The Respondent has submitted that the onus to prove any of the above grounds rests on the applicant which is true. It is a principle of law that whoever alleges must prove. The allegations made by the applicant particularly on the question of fair trial is serious. This is because one of the cardinal and constitutional right of an accused person under **Article 50** is the right to a fair trial. A fair trial entails or comprises rights listed under **Article 50 (2)** which includes a right to presumed innocent until the contrary is proved, right to an advocate, right to adequate time and facilities to prepare for his defence and other rights. I agree with the Respondent's counsel that making mere allegations of bias or any other thing that touches on the right to fair trial is not sufficient. A party making such a serious allegation should back the allegation with cogent and tangible reasons. In my view the reasons advanced by the applicant are merely speculative and besides that counsel for the applicant cannot adduce evidence or facts from the bar that a certain court is biased or friendly to a complainant.

In this matter, the complainant is the Judiciary because that is the body that is alleged to have lost revenue. I do not find anything personal on the evidence or facts presented before me about the witnesses or Judicial Officers working at Nkubu Law Courts that shows that they have issues against the applicant. It has not been stated that they lost their personal money. The money allegedly lost belonged to the Judiciary. I do not find basis for the complaint to state that one of the prosecution witnesses is friendly to the trial court. There is nothing personal pointed out by the applicant between any prosecution witnesses and the trial court and it is not enough to just speculate that he may not get fair trial on such shaky grounds.

13. On the ground of the convenience and expediency I do not find that Tigania or any other court in Meru County is more convenient to the applicant and witnesses in this case. He has not challenged the facts deposed by the investigating officer knowing that the witnesses are spread from Nairobi, Siakago, Nkubu and Meru or that Chuka Law Courts is more convenient and central to most witnesses in the case. I agree with the Respondent's counsel that the fact being unchallenged shows that the ground cited in the application is clearly unfounded. The applicant has not satisfied the conditions listed under **Section 81 of Criminal Procedure Code** to transfer the case from Chuka Law Courts to any other court with competent jurisdiction.

14. The Respondent has raised a technical point which is that in deciding where to charge an accused person, the Director of Public Prosecution exercises its statutory mandate. I find this argument legally sound because really the constitution and statute gives the Director of Public Prosecution the mandate and power to prosecute and the decision of whether or not to prefer charges and where to register those charges rest in that office. If a party feels that the power has not been exercised properly or fairly or that the Director of Public Prosecution has abused his powers by acting ultra vires, the correct or proper forum or way to challenge is through a Judicial Review. The decision to charge the applicant in Chuka Law Courts by the Director of Public Prosecution and DCI can be described as administrative given that they have justified the decision on grounds of convenience and expediency. The applicant has not clearly come out to say that he was prejudiced unfairly by that decision and if his complaint in this application is directed at the prosecution, the trial court or both. If the basis of his application was purely directed at the decision of the Director of Public Prosecution to charge him here in Chuka rather than Meru County, then he ought to have challenged the exercise of the power or mandate granted to the office of Director of Public Prosecution through a Judicial Review.

15. On the other hand if the application is based on the fact that the trial court is unfair or biased against him, the proper way was for the

applicant to apply for recusal of that court in the same court. The applicant has not stated that he applied for the trial court to recuse itself because he had reason to believe that the court was not fair to him or that he was unlikely to have a fair trial. The issue of biasness therefore has not been established and this court finds that the same are mere allegations and certainly this court cannot act on the basis of such.

16. In the premises this court finds that the application dated 29th November 2017 lacks in merit and bad in law. The same is for the reasons aforesaid disallowed.

Dated, signed and delivered at Chuka this 24th day of July, 2018.

R.K. LIMO

JUDGE

24/7/2018

Ruling dated, signed and delivered in the open court in presence of Muthomi for applicant and Machirah for Respondent.

R.K. LIMO

JUDGE

24/7/2018