



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**MISC.CRIMINAL APPLICATION NO. 10 OF 2018**

**JOSEPH KORIR alias DAVID ARAP CHONJO.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

[1] The Applicant herein, **Joseph Korir alias David Arap Chonjo**, filed the Notice of Motion dated **19 January 2018** pursuant to **Section 89(1)(a) and (e) and Section 123** of the **Criminal Procedure Code** for orders that the Court be pleased to transfer the hearing and determination of **Kapsabet Criminal Case No. 1180 of 2016** from the Court of the Senior Principal Magistrate, presided over by **Hon. D. Alego**, to any other court of competent jurisdiction; and that in the meantime, order that the Applicant's bond be reinstated.

[2] The application was premised on the grounds that the Learned Trial Magistrate has exhibited open bias in favour of the Complainant and the Prosecution and therefore the Applicant is apprehensive that justice may not be done in his case. In his Supporting Affidavit sworn on **19 January 2018**, the Applicant deponed that his bond was cancelled on the oral application of the Prosecutor on the grounds that he was interfering with witnesses; and that no proof was given in support of the allegation. He also averred that, on **18 October 2017** he attended court for hearing of the matter; and that while at the court cells on that day, he got to learn that there was going to be a scene visit, about which neither himself nor his Advocate had prior notice.

[3] The Appellant further contended that, after the scene visit, the Trial Magistrate openly held a separate meeting with a group of women who included the mother of the Complainant whose agenda was not disclosed to himself, his Advocate or the Prosecutor; and that he was shocked to learn that the arrangement to visit the scene had been made when a delegation went to visit the Trial Magistrate at her home whereby gifts were presented to her. That on account of the foregoing, his Advocate made an application for the Learned Trial Magistrate to recuse herself from the matter; but that she declined and demanded that affidavits regarding the allegations of impropriety be sworn by himself, his Advocate, Mr. Sagasi, the previous Prosecuting Counsel, **Mrs. Claire Kosgei** and his erstwhile Advocate, **Mr. Okara** and be filed for her consideration. He was of the posturing that in the circumstances, it would be in the interest of justice to transfer the case to another magistrate of competent jurisdiction for hearing and determination.

[4] The application is expressed to have been filed under **Section 89(1)(a) and (e) and Section 123(3)** of the **Criminal Procedure Code**. However, **Section 89** deals with the making of complaints and therefore is irrelevant to the matter at hand; and that it has no **Subsection (1)(a) or (e)**. I presume therefore that this was a typographical error and that Learned Counsel intended to rely on **Section 81(1)(a) and (e)** of the **Criminal Procedure Code**, which is the provision that gives the High Court the power to transfer criminal cases from one subordinate court to another. It provides that:

**(1) Wherever it is made to appear to the High Court-**

**a) that a fair and impartial trial cannot be held in any criminal court subordinate thereto; or**

....

**e) that such order is expedient for the ends of justice or is required by any provision of this code,**

**i) it may order 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."**

[5] Although no response was filed herein on behalf of the State, **Ms. Kagali** relied on various authorities to support her submission that the Learned Trial Magistrate ought to have been given an opportunity to pronounce herself on the matter before this application could be made.

It was her contention that, since no reasonable apprehension of bias has been disclosed by the application, the same ought to be dismissed. He relied on the following authorities, which I have put into consideration:

[a] **Republic vs. Hashimu [1968] EA 656;**

[b] **Shilenje vs. Republic [1976-80] 1 KLR 1662;**

[c] **Stanley Mutuma vs. Republic [2007] eKLR;**

[d] **James Ireri Mwaniki vs. Republic [2009] eKLR.**

[6] It is now trite that, while the High Court has the discretion to transfer a criminal case from one magistrate to another where there is an apprehension of bias, that discretion can only be invoked in situations where there is sufficient evidence to back up that apprehension. In **Shilenje vs. Republic** (supra) for instance, **Trevelyan, J.** cited with approval an excerpt from the **Commentary and Notes**, (14<sup>th</sup> Edition) and **Criminal Procedure in British India** that:

**“The High Court will always require some very strong grounds for transferring a case from one Judicial Officer to another, if it is stated that a fair and impartial inquiry or trial cannot be held by him, especially when the statement implies a personal censure on such officer.”**

[7] The same position was followed in **Kamande & 3 Others vs. Republic [2014] eKLR** thus:

**“When giving consideration to an application for the transfer of a case, the court will assess whether the applicant’s apprehension was reasonable and founded on sufficient material. The reason for laying emphasis on these factors is that the court has a duty to encourage trust in the integrity and independence of the Judiciary. Therefore allegations which may be directed at Judicial Officers, alleging bias and lack of fairness must not therefore be accepted without there being substantive evidence to back them.**

**If a court was too quick to accept allegations of bias directed against its officers, without first demanding proper substantiation, it would erode the very foundation upon which the judiciary was founded. At the same time, the court must balance this consideration with the need to ensure that justice is not only done, but also seen to be done.**

[8] Hence, the single issue for determination herein is whether the Applicant has furnished sufficient cause for the transfer sought, bearing in mind that the test as to whether a change of venue should be granted is determined from the perspective of the reasonable man and not that of the magistrate. This was the holding of the court in the case of **Tumaini vs. Republic (1972) EA 441**, and here is what the court had to say:

**“In considering the possibility of bias it is not the mind of the judge which is considered but the impression given to reasonable persons”:**

(see also **Republic vs. Hashimu** (supra).

[9] The Applicant's Supporting Affidavit adverts, first and foremost, to allegations that the Prosecuting Counsel had solicited for a benefit of **Kshs. 50,000/=** as an inducement to abandon the application for the cancellation of his bond. From the tenor and effect of the Supporting Affidavit it appears that the Applicant declined to make any such payment; and that he made a complaint about the solicitation as appropriate. There is nothing to show that the Learned Trial Magistrate was a party to the solicitation and therefore no connection can be inferred between that act of solicitation and the Applicant's fair trial before the Learned Trial Magistrate. The mere fact that the Trial Magistrate cancelled the Applicant's bond is no reason to conclude that fair trial will not be had. In the **Shilenje Case**, the Court came to the same conclusion and held thus:

**“...the refusal of bail on the applicant's bond alone could not be construed as a suggestion of bias, ... the incidents referred to by the applicant whether taken individually or collectively would not have created a reasonable apprehension in any right-thinking person's mind that a fair and impartial trial might not be had before the magistrate...”**

[10] I am accordingly of the view that the cancellation of the Applicant's bond cannot, of itself, be a valid ground for imputing bias on the part of the Learned Trial Magistrate. Needless to say that, the Applicant was not without remedy in connection with the cancellation of his bond; including the option to file an interlocutory appeal in that regard.

[11] Similarly, although allegations were made to the effect that the Learned Trial Magistrate received a benefit of **Kshs. 40,000/=** and a bunch of bananas from the Complainant, no concrete evidence was adduced in that regard. Paragraph 14 of the Supporting Affidavit wherein that allegation was made does not give an indication from whom the report of this serious allegation was received, granted that the Applicant was then in custody. My conclusion then is that this allegation is entirely baseless and unsubstantiated.

[12] However, the Applicant did advert also to matters of personal knowledge. He stated that he was only informed of the scene visit while in the cells awaiting hearing; and that while at the scene, the Learned Trial Magistrate held a side meeting with a group of women who included the Complainant, from which he was excluded. Those averments of fact are matters which the State was in a position to refute if they were indeed untrue; but were not responded to, and therefore un rebutted. They are allegations which, if left unexplained, would be sufficient to raise concerns in the minds of any reasonable person, as they did the Applicant. Consequently, I find apt the expressions of **Hamilton, C.J.**, in **M.S. Patel [1913] 5 KLR** the applicable test was explicated thus:

"I am not here concerned with an issue as to whether the magistrate was in fact likely to be partial or impartial and I am perfectly prepared to believe that the accused would have received a fair trial at his hands. But the test to be applied in such cases as this has been settled in various cases in Indian courts and I would refer particularly to the judgment of the Calcutta High Court in *Dupeyron vs. Driver* ... where the judges say:

"where the apprehension in the mind of the accused that he may not have a fair and impartial trial is of a reasonable character, notwithstanding that there may be no real bias in the matter, the facts of incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer."

[13] In the premises, I would allow the application and order the transfer of **Kapsabet Criminal Case No. 1180 of 2016** from the court of the Senior Principal Magistrate, (**Hon. D. Kayila**), to any other magistrate at Kabsabet Law Courts with competent jurisdiction to handle the matter; and that the Applicant be at liberty to request for reconsideration of his bail application before that court.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 8<sup>TH</sup> DAY OF AUGUST 2018**

**OLGA SEWE**

**JUDGE**