



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

CRIMINAL REVISION ON 132 OF 2018

(FORMERLY MARIMANTI CRIMINAL CASE NO. 447 OF 2017)

AMERIKA NYAGA.....1ST APPLICANT

DAVID MUSIMI.....2ND APPLICANT

NDUME NTUIRU.....3RD APPLICANT

BONFACE JUME.....4TH APPLICANT

JAMES MWINDU.....5TH APPLICANT

HENRY MWOGA.....6TH APPLICANT

KIMATHI NJERU.....7TH APPLICANT

JOSPHAT GITONGA.....8TH APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. **AMERIKA NYAGA** and 8 others have moved this court through a Notice of Motion dated 28th August, 2018 made under the provisions of **Section 262, 265** of the **Criminal Procedure Code** and **Article 50** of the Constitution, for the following orders namely;

- a) That the application be certified urgent and accorded priority (spent)
- b) That the proceedings in Marimanti Senior Principal Magistrate Criminal Case No.447/2017 be stayed pending the hearing and determination of this application.
- c) That Marimanti Senior Principal Magistrate's Criminal Case No.447/2017 be transferred from the trial court to another court.
- d) That this honourable court do make any other order/directive in the interest of justice.

2. The grounds upon which this application has been brought as listed on the face of the application are that the trial magistrate lacks jurisdiction to try them in the offence facing them.

3. The other ground is that the learned trial magistrate refused to hear the applicants after the advocate on record withdrew after a disagreement arose between him and the learned trial magistrate over the manner in which the proceedings were being conducted.

4. The applicants alleged that the trial magistrate has been compromised by one of the complainants and that the learned trial magistrate has been making disparaging remarks against their advocate which have made them feel harassed and intimidated.

5. The applicants have also made serious other allegations which touch on the conduct of the trial magistrate whom they view may not deliver justice owing to his perceived partiality in the case.

6. The applicants have supported their applications through Amarika Nyaga, the 1st applicant who has sworn an affidavit, sworn on 28th August, 2018. In the said affidavit the applicants have repeated the serious allegations which touch on the conduct of the trial magistrate and which question his impartiality to proceed with the trial. The applicants have raised questions on how the 8th and 9th accused were arrested within the court precincts as they tried to raise sureties for the 1st to 7th accused who had been charged on 11/10/2017. It is contended that the two accused (8th and 9th accused) were arrested ostensibly to intimidate sureties from coming to stand surety for them.

7. The applicants have contended that the basis of their arrest is a civil dispute with the complainant and that they are being unfairly punished and intimidated because of a land dispute which was determined vide Meru HCC No.235/1992 and which applicant allege that the complainant has failed to respect.

8. The applicants allege that the proceedings before the trial court are prejudicial, personal and unfair to them. The applicants have sworn a lengthy affidavit detailing instances they feel they were unfairly treated and/or showed that they are unlikely to get a fair trial in that court. This court does not wish to go into those details for purposes of preserving the dignity and integrity of our judicial system. Suffices to say that this court has considered all the issues raised and I have perused through the proceedings pursuant to both the powers conferred upon this court under **Section 362** of the **Criminal Procedure Code** and **Article 165(6)** of the Constitution. The allegations made by the applicants have not been contested as the respondent herein left the matter entirely to this court to determine it in the interest of justice.

9. The applicants herein have constitutional rights embedded in the constitution. Their right to access justice under **Article 48** and fair trial under **Article 50** like other rights other rights guaranteed by the constitution must be protected. I have perused through the proceedings at the trial court and have noted the following;

(i) The applicants persons are charged with the offence of incitement to violence contrary to **Section 96(a)** of the Penal Code. That charge is a serious offence and the first schedule Criminal Procedure Code provides that the offence should be tried by a subordinate court of first class. The provisions of **Section 7(1)** of the **Criminal Procedure Code** provides that a subordinate court of first class is presided over by a magistrate of a rank of Senior Resident Magistrate and above. In this instance the trial court is presided over by a Resident Magistrate and this obviously is an anomaly or an error which demonstrates that the applicants concern are well grounded in law.

(ii) I have noted that the allegations that 8th and 9th applicants were later arrested and charged alongside the other applicants are also true going by the proceedings in the trial court. I have also noted that there has been push and pull between the trial magistrate and the counsel representing the applicants and the proceedings clearly show that the applicants fears that a fair trial in not guaranteed are well found particularly given that the office of the Director of the Public Prosecution which is prosecuting the case at the trial court has not contested the serious allegations which touch on the impartiality of that trial court. The rights of the applicants to have a fair trial is guaranteed and must be protected by courts.

10. This court having considered all the issues raised and having perused through the trial court file, I am satisfied that the applicants were subjected to trial before a court not competent to try them. The trial in that court certainly is a mistrial and I find it as such. The applicants shall be taken before another court of competent jurisdiction and be charged afresh. In view of the serious allegations raised regarding the place of trial, this court finds that it is in the interest of justice, to transfer the place of trial from Marimanti Law Courts to Chuka Chief Magistrate's Court. The applicants are therefore be directed to appear before the Chief Magistrate's Court in Chuka Court on a date to be fixed during the delivery of this ruling for purposes of a fresh trial. The Notice of Motion dated 28th August, 2018 is merited and is therefore allowed in the above terms.

Dated, signed and delivered at Chuka this 23rd day of October, 2018.

R.K. LIMO

JUDGE

23/10/2018

Ruling dated, signed and delivered in the presence of all the applicants save for 8th applicant and in the presence of Machirah for state/Respondent.

R.K. LIMO

JUDGE

23/10/2018