



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

MISC. CRIMINAL APP. NO. 50 OF 2017

ISAIAH GWESI NYAKOE.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

By the Notice of Motion (undated) filed herein on 28th August 2017, the applicant seeks an order for transfer of his case Nyamira Chief Magistrate Criminal Case No. 5 of 2016 from that court. The gist of his application as can be discerned from the face of the application, the supporting affidavit and other documents filed on even date, is that his rights have been violated. He contends that the trial magistrate is biased and has shown partiality and traumatized him. In one document which he refers to as Grounds of seeking Transfer, he contends that the court gave a deaf ear whenever he tried to explain the Kenyan Constitution principle of justice to all despite one's status, that the trial magistrate is focused on a forced trial and is adamant, uncooperative and the "harsh" and "monstrous" condition has caused him to develop psychological torture. He therefore urges this court to order a transfer of his case to any other court outside Nyamira for justice to prevail.

At the hearing of the application, the applicant submitted that he has been patient as his rights were violated and has since 2016 tried to urge the trial magistrate to expedite the case which she has not done. He submitted that the trial magistrate refuses to listen to his elucidation of his constitutional rights and this has caused him to suffer psychological torture. He contended that Article 50 (4) of the Constitution is being violated and that this court has power to transfer his case to any other court in the country.

The application is opposed. Counsel for the prosecution submitted that the applicant did not avail proceedings; that the applicant has not demonstrated that delay complained of is being caused by the court and that the unfairness and lack of cooperation are mere allegations. Counsel submitted that transferring the case to another court will mean it shall begin afresh hence causing even more delay. He termed the application as mere forum shopping.

In reply to the submissions of Counsel, the applicant stated that he had lost confidence in the trial court. The power of this court to transfer a case from one subordinate court to another not seized with jurisdiction as is the application before me, is provided for in **Section 81 of the Criminal Procedure Code** and the conditions attached thereto listed as follows: -

- “(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 to 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 is only if any of the above conditions or all of them are met can this court order the transfer of a case from a court having jurisdiction as the Chief Magistrate's Court in Nyamira does in this case, to one that does not have jurisdiction. In other words, whereas this court has the discretion to transfer cases before the subordinate courts, such discretion must be exercised with the foregoing principles in mind. In **Khan Vs. Republic [1991] KLR 474 Bosire J**, as he then was, stated, and I agree with him: -

“1. The High Court has power under Section 581 of the Criminal Procedure Code to transfer the trial of a criminal case from

one subordinate court to another. However, this power can only be properly exercised in circumstances where it is obviously clear that the trial magistrate seized of the case either has an interest in the case or is in a compromising position with regard to the accused.

2. In considering whether or not to order a transfer, the court must not only look at the allegations made by the accused but it must also look at the effect the order of transfer will have on the overall administration of justice.

3.”

I have perused the record of the lower court as is my right to do so. The record shows that the trial magistrate took over the hearing of this case on 9th October 2017 as the trial magistrate who was hearing it was transferred. When the rights of the accused person under Section 200 (3) of the Criminal Procedure Code were explained to him, he elected to have the case heard afresh. The prosecution opposed this but nevertheless the trial magistrate allowed the applicant’s application and directed that the case would start afresh. The record shows that from then on although the trial magistrate fixed the case for hearing, the accused applied for adjournment and on one occasion (19th July 2018) he conceded to an application for adjournment by the state. On 22/8/2018 the state sought an adjournment because its witnesses had not been bonded. The applicant opposed the application but the trial magistrate upon considering the submissions by both sides granted an adjournment bearing in mind that the applicant had opted to have the matter start de novo and there were plausible grounds for the adjournment. The record shows that on a subsequent date, the trial magistrate summoned the OCS of the Station concerned and questioned for not bonding the witnesses and the OCS undertook to avail the witnesses at the next hearing date. The court then fixed the case for hearing on 10th December 2018. That record does not bespeak of a magistrate who is biased and intent on delaying the applicant’s case. To the contrary it bespeaks of a trial court that is concerned about the accused’s right to a fair trial that is also expeditious. It is also not true that the trial magistrate has been in conduct of the case since 2016. To transfer this case would have the effect of not only delaying it further which is what the applicant is complaining about, but it would occasion a lot of inconvenience to the witnesses who according to the lower court file come not far from this court.

Accordingly, I find that the application to change the venue of this trial has no merit and the same is dismissed.

Signed, dated and delivered in open court this 20th day of December 2018.

E. N. MAINA

JUDGE