



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**MISC. CRIMINAL APPLICATION NO. 17 OF 2016**

**JOHN MUSYOKA MUTUNGA.....APPLICANT**

***VERSUS***

**REPUBLIC.....RESPONDENT**

**RULING OF THE COURT**

1. The Applicant herein has filed an application dated 01/02/2016 seeking for an order that his criminal case being **Kithimani Criminal Case No.552 of 2015** be transferred to another court. The Applicant's case is that he has had great difficulty in having his rights addressed by the trial Magistrate more particularly his attempts to be supplied with certain occurrence books relating to some incident relevant and material to his case.

2. The Application has been strenuously opposed by the Respondents Learned counsel for the Respondent Mr. Cliff Machogu filed a Replying Affidavit in which he deposed that the proceedings at Kithimani law courts will be fair and impartial, that the Applicant has not disclosed how he will not be guaranteed fair trial before the Kithimani Law courts and finally that the application filed by the Applicant is misguided.

3. During the hearing of the Applicant's Application this court granted leave for parties to make brief oral submissions. The Applicant submitted that he has had trouble with the trial court at Kithimani over his request to be allowed to access certain Occurrence Book. The Applicant finally indicated that even though the said OB was finally availed, he was still determined to request for the transfer of his case. On the other hand, learned counsel for the Respondent submitted that the Evidence Act and Criminal Procedure provide fundamental canons to ensure justice in the Criminal Jurisprudence is realized. He further submitted that the OB in question has since been availed and further that the Applicant's Application has been overtaken by events since the trial Magistrate has since proceeded on transfer.

**4. Determination:-**

I have considered the Applicant's Application and the brief oral submissions presented by the parties. The issue necessary for determination by this court is whether or not the Applicant has raised substantial grounds to justify the transfer of his case from Kithimani Law Court to another court of similar

jurisdiction. I have perused the lower court file **Criminal Case No. 552 of 2015 at Kithimani Law Courts** and find that the Applicant herein is the first accused therein and is jointly charged with three (3) other accused persons and all face two (2) counts of robbery with violence contrary to Section 296(2) of the Penal code. It is further noted that the said case has substantially proceeded with four prosecution witnesses having testified. It is also noted that the issue of an OB sought by the Applicant during the

proceedings before the trial court was later resolved and in fact the Applicant did confirm at the hearing of this Application that the said OB was indeed availed as requested. The proceedings conducted at the lower court on the 27/01/2016 when prosecution witness Number 4 testified the Applicant of his own volition opted not to participate in cross examining the said witness and had sought to be taken back to the cells while his co-accused proceeded with the case. It is indeed quite clear that the Applicant's quest to have his case transferred elsewhere is likely to prejudice his three other co-accused with whom they are jointly charged.

Suffice to say that the remaining three (3) accused have not indicated whether they support the Applicant's request. The Applicant's initial complaint was to do with an OB which was subsequently addressed to the satisfaction of the Applicant who confirmed the same during his oral submissions.

In fact the Applicant informed this court that he had now changed his mind and is now ready to go back to Kithimani law courts and proceed with his case. It is to be noted that the Evidence Act and Criminal Procedure Code have fundamental safeguards and canons to ensure justice in criminal jurisprudence is adhered to and actualized. All Judicial Officers exercise independence in the discharge of their judicial functions by dint of Article 160 of the Constitution and are guided by the Provisos of Article 159 of the Constitution. That being the position, the practice of litigants seeking to have their cases moved from one court to another on the ground that they are not likely to get justice is discouraged because if the same is allowed, it will amount to forum shopping. Again in rare occasions a litigant could seek for recusal by a judicial officer if there are indeed clear grounds of bias exhibited and a party has to make the requisite Application either orally or formally. In the present scenario the Applicant has not shown whether he made any such application before the trial court. The court record shows the matter had been proceeding normally without any complaints by the Applicant or any of his co-accused. The Applicant therefore has not made out a good case for transfer of **Kithimani Principal Magistrate's Court Criminal Case Number 552 of 2015** to any other court. The Applicant is ordered to go back to Kithimani law courts and continue with his case. It is in the Applicant's interest and those of his co-accused to have the case fast tracked and concluded without delay.

#### **5. Conclusion:-**

The upshot of the foregoing observation is that the Applicant's Application dated 1/2/2016 lacks merit. The same is ordered dismissed.

Dated, Signed and Delivered at Machakos this 29<sup>TH</sup> day of **March** 2017.

**D. K. KEMEI**

**JUDGE**

In the presence:

John Musyoka Mutunga - Applicant....

Saoli for Respondent.....

C/A: Muoti.....