



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**MISC. CRIMINAL APPLICATION NO. 20 OF 2017**

**KELLY KESSES BANJUKA.....ACCUSED**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**THE APPLICATION**

[1] By a NOTICE OF MOTION dated 14<sup>th</sup> March 2017, the Applicant who with another accused person (who is said to have escaped from custody and has not been rearrested) face a criminal charge robbery with violence contrary to section 296 (2) of the Penal Code in Eldama Ravine Principal Magistrate's Court Criminal Case No. 53 of 2016 (formerly Cr. Case No. 157 of 2014 Kabarnet) seeks the following orders:

***1. THAT the honourable court be pleased to issue an order that the proceedings in ELDAMA RAVINE CRIMINAL CASE NO. 53 OF 2016 before Hon. M/S YATOR R.M be stopped forthwith.***

***2. THAT this HONOURABLE court be pleased to issue an order that ELDAMA RAVINE CRIMINAL CASE NO. 53 OF 2016 be transferred to the subordinate court at Kabarnet.***

[2] The application is expressed to be brought on the grounds as follows:

**"GROUNDS**

***(a) THAT the proceedings at Eldama Ravine Criminal Case No. 53 of 2016 are going without the accused attendance.***

***(b) THAT the trial magistrate HON YATOR R.M has shown open bias and hostility towards the Accused/Applicant who is apprehensive that justice may not be served after all.***

***(c) THAT the trial magistrate has made statement which appears to have convicted the accused even before the end of his trial without affording the Accused/Applicant a chance to be heard.***

***(d) THAT the accused/Applicant is apprehensive that in all likelihood he will be convicted unfairly taking into consideration the nature of the offence before he is charged with.***

***(e) THAT the trial magistrate HON. YATOR RM had earlier allowed the Accused/Applicant to be***

released on bond of Ksh. 250,000/- with a surety of the same amount and that when the surety came for approval she retracted on the same and unreasonably denied him bond.

(f) *THAT for the end of justice to be shown it is fair that the criminal case no. 52 of 2016 be transferred to Kabarnet from Eldama Ravine.*”

[3] The Notice of Motion was supported by an affidavit sworn by the applicant and filed in Court on 15<sup>th</sup> March 2017 setting out the factual basis of application as follows:

**“AFFIDAVIT OF KELLY KESSES BANJUKA**

1. *THAT I am a male adult of sound mind and the accused/applicant herein and hence competent to swear this affidavit.*

2. *THAT I am facing a charge of robbery with violence contrary to section 296 (2) in ELDAMA RAVINE CRIMINAL CASE NO. 52 OF 2016 before HON. YATOR R.M.*

3. *THAT the trial magistrate has shown open bias towards me and unreasonably barred me from attending court proceedings.*

4. *THAT the trial magistrate through her demeanor as well as statements has on diverse dates during the proceedings demonstrates hostility towards me and uttered words to the effect that she will convict me regardless of the evidence before her.*

5. *THAT the trial magistrate had earlier on given me a surety bond of Kshs 250,000/- but when the surety came for approval she withdrew her earlier orders and unreasonably denied me bond.*

6. *THAT the trial magistrate is openly conniving with the prosecution in every sense and I am apprehensive as to whether I will get fair trial since there is obvious partiality on the part of the trial magistrate.*

7. *THAT I have been denied witness statements.*

8. *THAT I make this affidavit in support of my **CASE CRIMINAL CASE NO. 52 OF 2016 TO BE TRANSFERRED TO Kabarnet from Eldama Ravine.**”*

[4] Counsel for the Director of Public Prosecution (DPP) did not file a response and was content to rely on the record of proceedings in the trial court in urging that the applicant only sought to delay his fair trial by the application to have the trial - in which 6 prosecution witnesses had already testified and only the last witness remained - transferred back to Kabarnet law Courts from where the matter had originally been transferred upon a complaint by the same applicant.

**THE PRINCIPLE**

[5] The principles for the grant of an order of transfer are set out in section 81 of the CPC as follows:

**“81. Power of High Court to change venue**

***(1) Whenever it is made to appear to the High Court—***

***(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 may order—**

*(i) that an offence be tried by a court not empowered under the preceding sections of this Part but in other respects competent to try the offence;*

**(ii) 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;**

*(iii) that an accused person be committed for trial to itself.*

**(2) The High Court may act on the report of the lower court, or on the application of a party interested, or on its own initiative.**

*(3) Every application for the exercise of the power conferred by this section shall be made by **motion**, which shall, except when the applicant is the Director of Public Prosecutions, be supported by affidavit.*

*(4) An accused person making any such application shall give to the Director of Public Prosecutions notice in writing of the application, together with a copy of the grounds on which it is made, and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of notice and the hearing of the application.*

*(5) When an accused person makes any such application, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the costs of the prosecutor.*

*[Act No. 13 of 1982, First Sch., Act No. 12 of 2012, Sch.]”*

[6] On the principal ground of want of impartiality on the part of the trial court relied on by the applicant, there must be reasonable apprehension of bias created in any right thinking person’s mind that a fair and impartial trial might not be had before the magistrate. See **Shilenje v. R** [1980] KLR 132 where Trevelyan, J., citing Sir John Woodroffe’s **Criminal Procedure in British India**, set out the principle as follows:

“On pages 612 and 613 of Woodroffe we have:

*...This clause deals with the case in which the High Court is satisfied that a fair and impartial inquiry cannot in fact be had, but such cases are rare for to move a case from one magistrate to another on grounds personal to him is tantamount to a severe censure of such officer and the very clearest grounds must exist before the High Court will interfere..A more ordinary class of case is that in which, although the High Court is not itself of opinion that a fair and impartial inquiry cannot be had yet a party has reasonable grounds for the apprehension that he will not have fair trial which is another matter. It is not sufficient that Justice is done; but it must also appear to have been done. **The law in such a case has regard not so much to the motive which might be supposed to bias a judge as to susceptibilities of the litigant parties. One important object is to clear away everything which might engender suspicion or destruct of the tribunal and thus to promote the feeling of confidence in the administration of justice which is essential to social order and security....The transfer of a case will therefore be granted not on the ground that the judicial officer is incapable of performing his duty, but simply to allay the apprehension of the applicant for transfer. The question in such cases is not whether there is actual bias...but whether there is reasonable...ground for suspecting bias...and whether incidents may not have happened which, though they might be susceptible of an explanation and may have happened***

without there being any real bias in the mind of the judge, are nevertheless such as are calculated to create in the mind of the parties to the action of the magistrate...Abstract reasonableness, however, ought not to be the standard...'

Which, if not precisely the same as Prinsep, is in line with it.

Having said so much let me apply it to the facts of the case, but first let us see what **section 81 of the Criminal Procedure Code (so far, that is, as it concerns us)** says. **It states whenever it is made to appear to the High Court that a fair and impartial trial cannot be had in any criminal court subordinate to it, or that such an order is expedient for the ends of justice, it may order the transfer of a case from a subordinate court to another such criminal court of equal or superior jurisdiction."**

[7] I respectfully also agree with Sir H. T. Prinsep in his *Commentary and Notes* 14<sup>th</sup> Ed. (1906) at 648 cited in *Shilenje*, supra, that –

*"It is the duty of the court to have regard to the importance of securing the confidence of the public generally, of every section of the community, in the fairness and impartiality of the trial that is to be held, **and it is equally its duty to see that no undue regard is shown to the abnormal susceptibilities of any section of the public from an apprehension of ulterior consequences.**"*

## **THE BACKGROUND**

[8] The record of the court indicates that the criminal charge was originally filed on 26<sup>th</sup> March 2014 at Kabarnet as criminal case no. 157 of 2014. The applicant is then said to have escaped from lawful custody sometime after the court appearance of 21<sup>st</sup> May 2015. Upon arrest on 30<sup>th</sup> December 2015, the accused was charged with the offence of escape from custody in Eldama Ravine Law Court. The Kabarnet Principal Magistrate subsequently on 15<sup>th</sup> January 2016 made an order directing that matter be heard at Eldama Ravine Law court as follows:

**"Court:**

*Matter to be heard at Ravine as the 1<sup>st</sup> Accused has several complains within the area. Matter to be mentioned before Ravine Law Courts on 18<sup>th</sup> January 2016 for further direction in regard to the 1<sup>st</sup> accused."*

[9] At Eldama Ravine the matter was allocated for hearing at Court 2 before Hon. Yator (SRM) and the same has beginning the 1<sup>st</sup> April 2016 proceeded to hearing of six witnesses with only one witness, the medical superintendent of Nakuru remaining. The trial was scheduled to resume on 25<sup>th</sup> April 2016 for further hearing.

## **Objective consideration of the applicant's complaints**

### ***Witness statements***

[10] The record of proceedings in Eldama Ravine Principal Magistrate's Court Criminal Case No. 53 of 2016 clearly shows that the applicant was given witness statements on two occasions before the hearing started, first by the Police and later in Court before the trial commenced with the calling of the complainant (PW1), as follows:

**"RECORD OF PROCEEDINGS CR 53 OF 2016**

4/4/2016

Coram: Before Hon. R Yator, SRM

State Counsel: Macharia

Court Clerk: Lilian

Accused: Present

**ACCUSED: I need copies of statements so to proceed.**

R YATOR

SENIOR RESIDENT MAGISTRATE

**PROSECUTOR**

**Accused was supplied with statements on 12<sup>th</sup> May, 2014 and he acknowledged receipt and signed the file and the witnesses in court have come from Kabarnet.**

**COURT:**

**I note that court ordered on 12<sup>th</sup> May 2014 that he be availed with statement and as for court order of 12<sup>th</sup> May 2014 in court file the court ordered for the same be issued by OCS Kabarnet. The police file as well shows that accused signed for the statements.**

R YATOR

SENIOR RESIDENT MAGISTRATE

**COURT**

*The accused be availed with copy of statements for the witness in court and he goes through it in the next two hours and matter shall proceed at 11.30am, as witness comes from Moyale.*

R YATOR

SENIOR RESIDENT MAGISTRATE

**Later at 12.00pm**

*Coram as before*

R YATOR

SENIOR RESIDENT MAGISTRATE

**ACCUSED**

**I have obtained all copies of all witness statements and in particular of the witness in court.**

R YATOR

SENIOR RESIDENT MAGISTRATE”

[11] This Court has previously held that providing the accused person with copies of statements by witnesses only a day before the trial does not give an accused person sufficient time to prepare his defence, see [Felix Mwova Vaasya v Republic](#) High Court of Kenya at Machakos Misc Crim App No. 48

of 2016. However, in this case there is evidence that the accused had been given the statements by the police at Kabarnet two years earlier on 12<sup>th</sup> May 2014 before the case started at Eldama Ravine law court upon transfer. Moreover, failure to grant adequate opportunity to prepare for defence is not a ground for the transfer of a case from one trial court to another; it may be a ground of appeal or review but it does not on its own indicate bias on the part of the trial court or support a finding that fair trial may not be had before that court for purposes of a transfer in terms of section 81 of the CPC.

[12] Be that as it may, if the accused considered, with the advice of counsel who joined the proceedings later, that the adequate preparation for cross-examination of any witness was not possible on account of late delivery of the witness's statement, an appropriate application for recall and further cross-examination of the witness could have been made under section 150 of the CPC which provides as follows:

***“150. Power to summon witnesses, or examine person present***

***A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:***

*Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”*

[13] Significantly, the applicant was clearly untruthful in deponing in his affidavit in support of the application that ***“I have been denied witness statements”***. It is a cardinal principle of justice in civil as well as criminal litigation that the Court shall not assist an untruthful applicant.

[14] The only application made upon counsel coming on the record was for readmission of the accused into the proceedings, which was granted to the extent that Counsel was allowed to participate, as shown in the record of proceedings for the day as shown below. This appellate Court cannot anticipate the decision of the trial court if such application for recall and further cross-examination of the witnesses were made before the trial court.

***On application for disqualification of the trial***

[15] The record sets out the proceedings on the application for disqualification of the trial court as follows:

*“18/5/2016*

*Coram Before R Yator. SRM*

*State Counsel – Macharia*

*Court Clerk – Ruth*

*Accused: Present*

*Prosecution: Am ready with two witnesses*

*ACCUSED*

***I am not ready as I have no confidence in this court because during mentions and hearing as it***

**has manifested itself is bias and in fact forced me to proceed with the matter yet I had no statement and that my case is transferred from this court to another.**

R YATOR

SENIOR RESIDENT MAGISTRATE

**Prosecutor**

*This is a 2014 matter transferred from Kabarnet to Ravine Law Courts and on same issues of statements the accused raised in Kabarnet. From police file and which I informed the court the last time the accused received and acknowledged receipt on 12<sup>th</sup> May 2014 of all statements. The matter proceeded on 4<sup>th</sup> April 2016 in this court, the accused raised same issues of statement and we informed court he had already been supplied and this court was lenient with him and gave him 2 hours to read statements. We supplied to him again and we proceeded with the case after he had sufficient time to go through statements. We object case be taken to another court as it's a delaying tactic he is using and which he used in Kabarnet. Justice is being denied to complainant by delayed method accused is using. Complainant resides in Moyale and it was difficult to ensure his attendance in court and if transferred to another court it means complainant will have to testify again and court to note it's a 2014 matter and not yet even half way.*

R YATOR

SENIOR RESIDENT MAGISTRATE

ACCUSED

**I have a right to transfer my matter if I have no confidence in court and its not that I will recall the Moyale witness with also using tactics to ensure I proceed and I have a right to recall witness as provided by the law.**

R YATOR

SENIOR RESIDENT MAGISTRATE

RULING

**I consider the accused's submission on this court to disqualify itself and I find that no justifiable reason is given to this court as to why it should disqualify itself. Further, the issue of witness statements the court notes that this matter was transferred from Kabarnet Law Courts and that the court did a perusal at the court file there had been orders for supply of witness statements. It was also shown to the court from police file that the accused did sign and acknowledge receipt of statements on 12<sup>th</sup> May, 2014 and to state that its an injustice is overboard. The issue of being forced by this court to proceed with evidence of PW 1 is not justifiable as the court did supply him with all statements and in fact gave him 2 ½ hours to go through statements of PW 1 whom he cross-examined and as such no injustice has been suffered. The court also notes that justice has to be served upon all parties and such a delay would be an injustice not only to accused but also to complainant and witnesses attending court and witnesses from East Pokot. As such the court shall proceed to hear and determine this matter.**

R YATOR

SENIOR RESIDENT MAGISTRATE

ACCUSED

**I Knew I will be frustrated by this court due to tribalism as I am a Pokot and you are a Tugen and this is due to the well known cattle rustling between Pokot and Tugen hence takes it on me.**

R YATOR

SENIOR RESIDENT MAGISTRATE

COURT

**I note accused's sentiments and this court determined matters not on basis of tribalism and further I am not a Tugen as alleged by accused and as such matter to proceed.**

R YATOR

SENIOR RESIDENT MAGISTRATE”

[16] It is clear that the Court exercised its discretion in declining the application for disqualification judicially after considering the accused's complaint and the response thereto by the prosecution and the circumstances of the case, and it cannot be said the decision was plainly wrong to call for interference by the appellate court. As pointed to above, if it was considered that further cross-examination was necessary, the accused could have sought to recall the witness (PW1). Here, the accused himself confirmed that he did not wish to recall the witness saying:

**“I have a right to transfer my matter if I have no confidence in court **and its not that I will recall the Moyale witness with also using tactics to ensure I proceed and I have a right to recall witness as provided by the law.**”**

So what was the objection as to witness statements, if not to assist the accused in cross-examination of the prosecution witnesses!

[17] It is established principle, also applicable here, since *Mbogo v. Shah* [1968] EA 93 that **“a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice”**.

[18] It is also clear the accused was driven by his own **subjective** fears of “no confidence in the court” rather than any **objective** manifestation of actual or likely bias on the part of trial court, a matter which discussed below. There is no right to transfer of a case merely because the accused has no confidence in a court; circumstances must exist such as would lead a reasonable man to a conclusion that a fair trial may not be had before that court. This is what Sir H. T. Prinsep in his *Commentary and Notes* 14<sup>th</sup> Ed. (1906) at 648 cited in *Shilenje*, supra, counsels: that it is the duty of the court **“to see that no undue regard is shown to the abnormal susceptibilities.”**

### ***Exclusion of the applicant from his trial***

[19] The record indicates that the trial court made an order excluding the accused from his trial having taken the view that the accused's conduct had consistently with Article 50 (2) (f) made it impossible for the trial to be held in his presence. Article 50 (2) (f) of the Constitution provides as follows:

“(2) Every accused person has ***the right to a fair trial***, which includes the right—

(f) to be present when being tried, **unless the conduct of the accused person makes it impossible for the trial to proceed;**”

[20] From the record of the proceedings, the events which transpired leading to the order of exclusion of

the applicant from his trial were as follows:

“05.10.2016

**Accused:**

*I am being escorted by Police Officers who threatened me that they will kill me and they are armed and I am being threatened by officers who escort me and **I pray my matter is transferred to High Court Nakuru** and I am informed complainant has said “**he has put the court in his pocket and shall ensure I shall be convicted.**”*

R. YATOR

SENIOR RESIDENT MAGISTRATE

**COURT:**

**I do note that the accused is making allegations which have to be heard and as such summons to issue to OCS on alleged threats by the escorting officers. However the matter shall not be transferred to the High Court.**

R. YATOR

SENIOR RESIDENT MAGISTRATE

05.10.2016

**14.10.2016**

*Mention at GK Prison, Nakuru*

Coram: Before Hon. R. Yator – SRM

*State Council – Miss. Mburu*

*Court clerk – Lilian*

*Accused – present*

**COURT:** *Hearing on 26<sup>th</sup> October 2016.*

R. YATOR

SENIOR RESIDENT MAGISTRATE

14.10.2016

26.10.2016

Coram:

*Before Hon. R. Yator – SRM*

*State Counsel – Miss. Mburu*

*Court clerk – Lilian/Diana*

*Accused – present*

**Prosecutor:**

*I am ready with one witness.*

R. YATOR

SENIOR RESIDENT MAGISTRATE

**Accused:** *I am not ready as I have been unwell and I was not taken for medication.*

R. YATOR

SENIOR RESIDENT MAGISTRATE

**COURT:**

*Matter shall be adjourned for accused to be taken for medication. Hearing on 29<sup>th</sup> November 2016. Mention on 28<sup>th</sup> October 2016.*

R. YATOR

SENIOR RESIDENT MAGISTRATE

26.10.2016

28.10.2016

*Mention at GK Prison Nakuru*

*Coram:*

*Before Hon. R. Yator – SRM*

*State Council – Miss. Mburu*

*Court clerk – Lilian*

*Accused – present*

**COURT:** *Hearing on 29<sup>th</sup> November 2016. Mention on 11<sup>th</sup> November 2016.*

**Accused:**

*I was not taken to hospital despite order being issued. In fact I was assaulted by police officers at Eldama Ravine and they put me in cells with mad person and they even tore my jacket and in fact **I recorded my statement and issued with O.B number and I need a P3 form and need to know reason they beat me and locked me up with a mad person and I fear the police actions over my life.***

R. YATOR

SENIOR RESIDENT MAGISTRATE

**COURT:** *Summons to OCS on the hearing date to clarify the accused's allegations.*

R. YATOR

SENIOR RESIDENT MAGISTRATE

28.10.2016

11.11.2016

*Coram:*

*Before Hon. R. Yator – SRM*

*State Council – Wangila*

*Court clerks – Lilian/Diana*

*Accused – absent*

**COURT:** *Hearing on 29<sup>th</sup> November 2016.*

***Prosecutor:*** *The mention was be in prison.*

R. YATOR

SENIOR RESIDENT MAGISTRATE

**COURT:** *Mention on 25<sup>th</sup> November 2016*

R. YATOR

SENIOR RESIDENT MAGISTRATE

11.11.2016

25.11.2016

***Mention at GK Prison, Nakuru***

*Coram:*

*Before Hon. John L. Tamar – PM*

*State Counsel – Wangila/Ndengwa*

*Court clerks – Ruth/Edgar*

*Accused – present*

**COURT:** *Hearing on 29<sup>th</sup> November 2016.*

J. TAMAR

PRINCIPAL MAGISTRATE

25.11.2016

29.11.2016

Coram:

Before Hon. R. Yator – SRM

State Counsel – Wangila

Court clerk – Lilian

Accused – present

**Prosecutor:**

*The same for further hearing and I am not ready as the doctor who was to attend is held up in a meeting in Nairobi on their welfare hence seek another date.*

R. YATOR

SENIOR RESIDENT MAGISTRATE

**ACCUSED:**

**I pray that the prosecution closes its case and I had prayed that I have no faith in court and I was even forced to proceed yet I was unwell and I had not obtained witness statements and the police insisted I had copies and the court is colluding with the police and I pray court disqualifies itself and my matter transferred from this court.**

R. YATOR

SENIOR RESIDENT MAGISTRATE

**EXAMINATION OF FEMALE ADULT CHRISTIAN SWORN AND STATES IN KISWAHILI:**

***No. 233570 CI. Victoria Mutuko OCS, Eldama Ravine Police Station. I am aware of summons and allegations by accused of officers that want to kill him and conduct of accused is questionable and the way he normally behaves raises a lot of doubts and according to intelligence there are plans of accused being rescued by his syndicate either on his way from Nakuru GK Prison, or in Police station or from this court. As per NPS Act we are empowered to use any necessary means and be pro-active to prevent escape of any person which includes handcuffing his legs and hand. Accused in court makes many allegations against many officers and myself and issues of threats are not supported by any facts and in support of that I pray court considers my affidavit against accused. Article 50 (1) f on fair hearing to proceed in trial but how he behaves in police station. He even assaulted prisoner at police cells and he also refused finger prints to be taken and has duly been charged in this court and behavior displayed by accused at police cells is usually violent and a threat to other prisoners and there are rumours accused is claiming Eldama Ravine police officer are included in threatening to kill him.***

*On 23<sup>rd</sup> May 2016 accused threatened to kill PC. Manyundo after he testified in his case of escape from lawful custody and booked in O.B NO.24/23/5/16 and alleged during time of arrest upon escape from lawful custody officers stole from him ksh.8,000/= and same was investigated by former DCIO CI Atonga and recommended file be closed as it had no basis. The accused while in cells normally bang's cells doors making it uncomfortable for other prisoners and I hence pray that the accused's case is expeditious so as there is no delay as per Article 50 (1) E of the*

Constitution. I have nothing against accused and respect his rights and in case of any allegations against my officers I am ready to carry out investigations.

R. YATOR

SENIOR RESIDENT MAGISTRATE

**Accused:**

There is one officer namely Mark who told me I will not complete my case before he kills me and I know it is an armed officer and told OCS and brushed it away and I am always handcuffed my hands and legs to ensure I attend court and I come screaming on the way due to pain. I wonder why threats to kill PC. Mangondu were not brought to court and if the file was closed it seemed closed. File of ksh.8,000/= was closed as no facts connection on officers but it was investigated by DCIO. Yesterday I was threatened and OCS mention court name that I have complain and I was in separate cell and Cpl. Karanja told me I be praying I reach Ravine. I spend night handcuffed in the cells and I cannot go for calls which is unconstitutional. I heard him say I assaulted a prisoner and that prisoner has to be proved I indeed assaulted him and I was assaulted by a mad person in the cells who was knocking himself against the wall and I was issued with O.B and I could have been killed by a mad person and **I totally feel unsafe at Eldama Ravine Police Station and pray court consider that I be escorted by officers from other police station or GK Prison but not Eldama Ravine and I have recorded two O.B's separately with the station and none is in court and of being assaulted by PC. Mark and a mad person and OCS referred it be recorded in O.B and it is hard for OCS to charge his officer. I pray that my case is transferred to Nakuru.**

R. YATOR

SENIOR RESIDENT MAGISTRATE

**PROSECUTOR:**

From allegations by accused and affirmed by OCS I request the police use reasonable force to restrain the accused putting in mind he has constitutional rights until matter is heard and concluded.

R. YATOR

SENIOR RESIDENT MAGISTRATE

**COURT RULING:**

I do note the sentiments by the accused on the threats to his life and response by the OCS on **the conduct of the accused who has made it a challenge for them arraigning him in court and allegations of causing disturbance while in police custody and to other prisoners at police cells.**

The court is also aware and takes note of the accused's character and **conduct while in court where on several occasions he has raised issues of having no confidence in this court alleging the court is colluding with police officers so to convict him.** The issue of court disqualification was addressed earlier and the status quo still remains that this court shall not disqualify itself as it works without fear of favour. At one time accused alleged court was tribalistic against him and at other instances raising his voice against the court and which amounts to contempt of the court.

Article 50 (1) of the Constitution entitles the accused to fair hearing. Article 50(2) (f) of the Constitution requires that an accused is present in court during trial of his matter unless his conduct makes it impossible to proceed in his presence. **As such considering the accused's**

**conduct in court severally making allegation of threats, creating disturbance to other prisoners and unwanted conduct in open court, the trial shall hence proceed with remaining witnesses in his absence and in terms of Article 50 (2) (f) of the Constitution.**

R. YATOR

SENIOR RESIDENT MAGISTRATE

*Ruling delivered in open court this 29<sup>th</sup> November 2016 in presence of accused. Right of Appeal explained. Further hearing on 13<sup>th</sup> February 2017.*

R. YATOR

SENIOR RESIDENT MAGISTRATE

29.11.2016”

[21] To be sure, the Magistrate’s Court has no power to transfer a case to the High Court, as sought by the Accused on as jurisdiction under section 81 CPC lies with the High Court. It is noted that the trial court and the police dealt with allegations of threats on the accused in a professional manner in causing investigations and summoning the Officer Commanding the relevant police station.

[22] However, it appears from the record that the court moved *suo motu* and, without giving the accused an opportunity to show cause why he should not be excluded from his trial, excluded the accused from his trial on grounds of his conduct both at the police station and before the court. As discussed below, exclusion is a last resort measure because it restricts the accused’s right to fair trial, and it should only be ordered when the conduct of the accused makes his **trial before the court**, not custody, impossible.

[23] The Court subsequently declined to review the order for exclusion of the accused made by Counsel then instructed to come on record for the accused, as follows:

“13.02.2017

*Coram:*

*Before Hon. R. Yator – SRM*

*State Counsel – Miss. Mburu*

*Court clerk – Lilian/Diana*

*Accused – absent*

***Keboga:***

*I want to come on record for the accused and in view of happenings in the file and I visited accused in remand on Friday and he is remorseful and he apologizes for his unbecoming conduct towards this court and I have personally advised him that his conduct in court was improper and lacked respect in this court and that it was not a way a civilized person should conduct himself. He is very apologetic and remorseful and pray he be forgiven for his misconduct and we have respect for this court and you personally and I make application with a heavy heart and pray accused is allowed to attend court during hearing and I also understand matter is almost over and having looked at proceedings I feel he is required to be defended and that I be allowed to come on record and that accused be considered to attend court however difficult it may appear.*

R. YATOR

SENIOR RESIDENT MAGISTRATE

**Prosecutor:**

*In response, it is true matter has proceeded substantially and the court invoked **Article 50** for proceedings to apply in his absence and orderly way for advocate to vary orders is to appeal as this court has no power to review its own orders and his application is not merited and that it be disallowed.*

**Keboga:**

*We pray for review of the orders as the court which made it is mandated to review the same hence application is merited and court has powers to review its own orders and that same be reviewed in terms of the application matter.*

R. YATOR

SENIOR RESIDENT MAGISTRATE

**Prosecutor:**

*I was expecting one witness the Investigating Officer who informs me he is away in Mombasa on official duties summons to PC. Charles Mwita.*

**COURT:** Ruling on 20<sup>th</sup> February 2017.

R. YATOR

SENIOR RESIDENT MAGISTRATE

13.02.2017

**RULING**

*I do not submissions by Mr. Keboga counsel who came on record for accused herein on the 13<sup>th</sup> February 2017 requesting this court to review its orders of 29<sup>th</sup> November 2016 of having the matter proceed in absence of the accused in terms of **Article 50 (2) (f)** of the **Constitution**.*

*I have considered the same, however the court notes the call of proceedings herein by Nakuru High Court vide Misc. Criminal Case No.65 of 2016 and in terms of that Court's Order of 9<sup>th</sup> December, 2016.*

**As such I am convinced that there is a likelihood of appeal and/or review of my orders of 29<sup>th</sup> November 2016 and such find it unreasonable to review and/or vary my earlier orders. As such the order issued by this court on 29<sup>th</sup> November 2016 and court shall proceed with hearing in absence of accused. However his advocate shall participate fully in hearing of remaining witnesses.**

R. YATOR

SENIOR RESIDENT MAGISTRATE

20.02.2017"

did not become *functus officio* so that only the High Court could rectify any error in the order for exclusion of an accused from his trial. The trial court, in my view, remained in control of the trial until final judgment and sentence, and could readmit the accused to the trial.

[25] Where an accused engaged in conduct that “was disruptive and made it impossible for the trial court to conduct the proceedings” his exclusion would be proper and if aggrieved thereby he could seek to appeal or to review the decision. see *Daniel Karuma alias Njalu v Republic* [2015] eKLR. However, while the trial court’s discretion to exclude an accused from his trial for misconduct is undoubted, the same must be exercised judicially and with circumspection regard being had of the accused’s right to a fair trial in accordance with the justice principle that justice must not only be done but seen to be done: see by all including the accused.

[26] Judicial exercise of the discretion requires that the order to exclude be made for reasonable grounds for which the accused must be given an opportunity to rebut. In addition, exclusion must be on grounds relevant to the specific trial before the court; it cannot be right for the court to exclude an accused from his trial pending before the court as a punishment for raising an issue of disqualification of the court, unsupported allegations of threats by police officers, general misconduct or bad manners in and outside court, or for contempt of court in raising his voice against the court.

[27] If guilty of contempt of court, he should be punished in accordance with the procedure for dealing with contempt in the face of the court, not by being excluded from his on-going trial! In this case, it seems that the accused was excluded from his trial more for his conduct while in police custody than for his conduct in the course of trial before the court.

[28] In this regard, this court finds that the trial court did not properly exercise its discretion in excluding the accused from his trial. Being an exception to the general rule of presence of the accused in his trial, it should only be exercised for the gravest of conduct in court which makes impossible the proper conduct of proceedings in his trial. An accused should not be excluded from his trial merely because his conduct makes it difficult for the court to carry on the proceedings or he exhibits rudeness, unpleasantness or contempt towards the court: there are procedures for dealing with such eventualities without appearing to limit the fair trial rights of the accused, consistently with *the less restrictive means* principle of Article 24 of the Constitution.

[29] I do not agree that having regard to the recorded conduct of the accused he was liable to suffer the extreme punishment of exclusion from his trial. I think that in exercising the discretion to exclude the accused from his trial, the magistrate misdirected himself on the nature and threshold of conduct justifying exclusion, and this has resulted in the injustice of the accused being tried in absentia despite his willingness to participate in his trial. In accordance with *Mbogo v. Shah*, supra, I agree that the trial court’s decision herein must be reviewed by an appellate court.

### ***Complaint relating to denial of bail after previous grant***

[30] On a plea for review of bail by the accused/applicant, the trial Court record indicates as follows:

“22/6/2016

***Accused***

*I was awarded a bond of Ksh. 250,000/- plus 1 surety of same amount and **I cannot raise the same.***

R YATOR

SENIOR RESIDENT MAGISTRATE

***Prosecutor***

*I object the application for reasons that when accused was in Kabarnet he escaped while in police custody and later arrested and charged with offence of escape vide this court file No. 52 of 2016 and have a handwritten note from Kabarnet when he escaped. Accused has no permanent abode and if given bond terms it would be difficult to trace him hence defeating justice.*

*Where the case has reached it's a final conclusion and if he had the witness today and now we have remained with investigating officer and the doctor and if witnesses have not testified especially chief who comes from Kaloa, the accused will be a security threat and can trace the chief as he comes from some area. When he had escaped he threatened the complainant who testified who made him run away from that region and belief if let out on bond will still threatened the witnesses and pray that matter be heard till conclusion.*

R YATOR

SENIOR RESIDENT MAGISTRATE

**ACCUSED**

*I object the submissions by State Counsel that I am a threat if released on bond and there is no where it is proved I ever threatened any witness and if that is the case he would have report of threats or I would have such charges. To say I escaped from Kabarnet it hearsay and it is a way of objecting to my bond and at no time have I been not proved to be guilty of escaping and I pray for reduction of the bond terms and I be granted bond as provided by the law. There is no proof in court that I threatened any of the witnesses.*

R YATOR

SENIOR RESIDENT MAGISTRATE

**COURT**

*I have considered the submissions and note that no formal report has been made concerning the threats nor any noted in the court file. **As such considering the nature of offence the court shall not revise the bond terms but that the accused's bond of Ksh.250,000/= plus 1 surety of same amount still stand.***

R YATOR

SENIOR RESIDENT MAGISTRATE

22/6/16”

[31] There can be no challenge on the court's discretion in declining to review the terms of bail for the reasons disclosed, dismissing the Prosecution's alleged threats on witnesses by the applicant and giving due weight to the nature of the offence.

[32] The Court then cancelled the bail in subsequent proceedings on application by the Prosecution for denial or cancellation of bail granted, as follows:

“20.02.2017

*Before R. Yator – SRM*

*Court clerk – Lilian*

*State Counsel – Monicah*

*Accused – absent*

R. YATOR

SENIOR RESIDENT MAGISTRATE

**COURT:**

*I do note the title deed Reg. Trans-Nzoia/Sinyerere/634 in names of one Joseph Geoffrey Wafula the intended surety and do hereby have the same title deed forwarded to DCIO Koibatek for authentication.*

*Mention on 27<sup>th</sup> February 2017.*

R. YATOR

SENIOR RESIDENT MAGISTRATE

22.02.2017

27.02.2017

*Coram:*

*Before Hon. R. Yator – SRM*

*State Counsel – Miss. Mburu*

*Court clerk – Lilian*

*Accused – absent*

**Keboga:**

*Same is to confirm authenticity and we took the title deed for DCIO Koibatek and we want to verify from DCIO Kitale.*

R. YATOR

SENIOR RESIDENT MAGISTRATE

**COURT:**

*Summons to the DCIO Mr. Walucho to confirm why he didn't follow up on the same.*

*Mention at 2.00 p.m.*

R. YATOR

SENIOR RESIDENT MAGISTRATE

27.02.2017

27.02.2017

*Coram:*

Before Hon. R. Yator – SRM

State Counsel – Miss. Mburu

Court clerk – Lilian

Accused – absent

**Prosecutor:**

There were summons to DCIO.

R. YATOR

SENIOR RESIDENT MAGISTRATE

**MALE ADULT CHRISTIAN SWORN AND STATES IN KISWAHILI:**

No.231542 CI. Walucho Masaai. I am DCIO Koibatek. I do recall on 23<sup>rd</sup> February 2017 I received a court order dated 22<sup>nd</sup> February 2017 instructing me to verify title deed No. **Tranzoia/Siyerere/634** in name of Joseph Geoffrey Wafula who wanted to stand surety for Kelly Kesses in Criminal Case No.53 of 2016. When I received the order unfortunately I did not have a vehicle which had taken some officers to Baringo North for operation and I then talked to DCIO Kitale and wrote a letter to him to assist me verify the same and dated 23<sup>rd</sup> February 2017 and documents forwarded to DCIO Kitale and same were collected from my office by intended surety and I was waiting for documents from DCIO Kitale up to around 12.30 p.m. I had not received the same and later in course of today the advocate for accused came to my office with the documents and in that respect the right procedure was not followed and it's my humble prayer that rightful procedure and I apologize for any inconvenience.

R. YATOR

SENIOR RESIDENT MAGISTRATE

KEBOGA:

I appreciate the DCIO's submissions and would like to state there is a letter from DCIO Kitale confirming title deed is genuine and having apologized for lack of procedure, it would be prudent for him to submit the letter and he has confirmed he gave the letter to intended surety and nothing has been pointed out that the letter did not get to DCIO Kitale. I do apologize for not following rightful procedure and now that surety has come all the way from Kitale its prudent he is examined as the process has been very expensive for us and the surety be confirmed unless DCIO is saying the letter is not authentic.

R. YATOR

SENIOR RESIDENT MAGISTRATE

PROSECUTOR:

**Before court makes orders, I have an application to make, that the accused person be denied bond and if any was awarded it be cancelled for the reasons that;**

1) The accused is a flight risk and has no known place of board and if released he will not be traced by court if he absconds trial.

2) During pendency of instant suit which was initially in Kabarnet Law Courts, the accused was said to have escaped from lawful custody on the 5<sup>th</sup> June 2014 while at Kabarnet Police Station while awaiting to be transported to Eldoret GK Prison and he escaped with other remandees and its only until 28<sup>th</sup> December 2015 (1 ½ years) later that he was arrested within Eldama Ravine town and he did not surrender himself to police and he knew he had a pending case in court. And as such was charged with offence of lawful escape vide Eldama Ravine Criminal Case No. 52 of 2016 which was formerly Kabarnet Criminal Case No. 1043 of 2015 and the same is still pending before this court after it was transferred on request of accused and the most primary considerate court should have in mind whether to grant accused bail or whether accused will voluntarily and seemingly attend trial. We submit that accused will not do that.

Further in an affidavit sworn by C I Victoria Mutuku OCS Eldama Ravine Police Station on 29<sup>th</sup> November 2016 same in court file, paragraph 6 (i) its deponed that the police officers had received information that the accused was planning to escape while on transit from Nakuru G K Prison to Eldama Ravine Law Courts where he attends trial and in paragraph 6© its deponed that the accused herein threatened to kill one P C James Magondu attached to DCIO Koibatek after he testified in Eldama Ravine Criminal Case No. 52 of 2016 (escape case) and same were done within the precincts of this court and same reported vide OB No. 24/23/5/2016 in Eldama Ravine Police Station and I have a certified copy of the OB. The behaviour and character of the accused has been such that he does not respect court process and that is why he is threatening witnesses yet to testify and was alleged to have assaulted a fellow remandee at Eldama Ravine Police Station and charges have been proffered against him vide Criminal Case No. 1095 of 2016 and same still pending before this court.

This means the accused's right to liberty should not be held paramount to other members of the community's rights as they also have a right to enjoy their peace and we submit that if accused is released the rights of other people will be infringed. The charges accused is facing are Robbery with violence contrary to section 296(2) of the Penal Code which is a grave offence punishable by death. The fact that accused appears to know so well hence reasons he escaped from lawful custody. The case has substantially proceeded and it's our prayer accused continue to be remanded at Nakuru G K Prison till final determination of this matter. In any case in Eldama Ravine Criminal Case No. 52 of 2016 formerly Kabarnet Criminal Case No. 1043 of 2015 there is a court order on 30<sup>th</sup> December, 2015 to the effect that the accused person be remanded in prison till ye final determination of the case is still pending and as such we humbly request court that there are sufficient compelling reasons that warrant the denial of bond to the accused person herein.

R YATOR

SENIOR RESIDENT MAGISTRATE

KABOGA

Accused has a constitution right to a fair trial and entitled to bond. In considering whether accused was entitled to bond previously, you did find that indeed he decided to be out in court meaning he had satisfied conditions of court to be given bond.. Court is informed of accused's case of escape from lawful custody and regardless of that case which has not been proved, the same is contended and accused has not been proved guilty and is hereby a charge by the police you are told accused has been threatening police and accused has personally informed me that he has been receiving threats from police and in fact from Mr Mangondu who he says he told him he will ensure he does not come out of prison as he escorted him from Kabarnet to prison and it is clear there is bad blood between them. The accused can rebut any allegations against him/

We are told the police demanded money for accused and accused says he lost Ksh. 300,000/- and not sure about the allegations but it is clear there is bad blood between police and accused. The O B produced shows no charge of the threats. **If entitled to bond despite having even ten cases in**

court. It is not enough to say accused has 3, 4, 5 cases pending in court and it may be so but he has not been given an opportunity to enjoy his bond terms and then violate those terms. If prosecution had said he was given bond then he jumped bail that would have been different but that has not occurred and all prosecution is saying is mere allegations. “this may happen”. It is our submissions that accused is entitled to be given bond as right as enshrined in the constitution which being the superior law, it is a matter of right. The cases ongoing are yet to be proved and he has not been proved guilty and on point of view I see no reason to deny bond. Reasons by prosecution are not sufficient to deny accused to enjoy his constitutional rights.

R YATOR

SENIOR RESIDENT MAGISTRATE

PROSECUTION

*It is true right to bond is Constitutional right Under Article 49(h) the right is not absolute and has a rider (refers.....”**unless there are compelling reasons**”) I wish to reiterate that reasons given are sufficient compelling reasons and reasons of bad blood and if indeed accused lost the said money he should have made the complaint and why is not only the accused who has several complaints so many accused And remandees pass through the police and it is only accused who complains all the time and I pray that the submissions y counsel are not merited and he be denied bond.*

R YATOR

SENIOR RESIDENT MAGISTRATE

**RULING**

*I have considered submissions by counsel for the accused as well as the prosecution and firstly I would dispense with the DCIO’s further verification of the authenticity and the title deed of the intended surety.*

*On whether accused is entitled to bond terms, the court is agreeable and is alive to the Constitutional provision that every accused person has a right to be awarded bond and/or bail. The court is also aware of the rider that ‘**unless there are compelling reasons**’. Despite the accused having several other cases, the court shall [not] go into proceedings of the separate cases. I however note the kind of charge herein and the stage at which the charges and hearing has reached. The court also noted its earlier ruling that the charges shall proceed on the accused due to his character which made it difficult to proceed in the presence of the accused. In terms of earlier affidavit sworn by OCS and the difficulty availing him in court to my view amount to compelling reasons as to why he should not be awarded bond terms .*

*The court also can’t turn blind eye to the fact that accused did ever escape from lawful custody while facing charges herein before the Kabarnet Law Courts and as such I find that securing his attendance would be a challenge and as such the earlier bond terms awarded are dispensed with and the accused to remain in custody till the full conclusion of the charges herein.*

R YATOR

SENIOR RESIDENT MAGISTRATE”

[33] The Court may make orders as to bail and review the same from time to time depending on changed or changing circumstances of the case. Moreover, if aggrieved by the denial of bail or the terms thereof, the accused could have moved the High Court for bail or review of terms thereof in terms of section 123 (3) of the Criminal Procedure Code, which provides as follows:

*“(3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.”*

[34] I do not find that the trial court took into consideration any improper matter as to taint the exercise of the discretion with bias or improper consideration resulting in an injustice. The existence of the charge of escape from lawful custody even though not proved by the prosecution is sufficient to support a finding of likelihood or risk of flight and non-attendance by the accused if released on bail. Moreover, the refusal of bail by one court cannot be a ground for transfer of a case to another court being an exercise of judicial discretion, unless it can be shown, which is not the case here, that it is a manifestation of bias or its likelihood on the part of the court. In addition, an accused aggrieved by a decision on bail by a trial court may apply for bail in the High Court in terms of section 123 (3) of the CPC. Such application is not before this court.

#### ***Alleged adverse comments by and hostility of the trial court***

[35] There was not produced evidence of any adverse comments by the trial magistrate as to justify an inference of likelihood of bias. Indeed, the Record shows a meticulous record of the events before the Court, of careful effort in trying to keep away from any adverse reactions to provocation by the accused, for instance, in the cool response to the allegation of tribalism by reason of belonging to Tugen tribe, an allegation which she calmly clarifies to be erroneous.

[36] The complaint that the trial court has *“during the proceedings demonstrated hostility towards me and uttered words to the effect that she will convict me regardless of the evidence before her”* was not supported by evidence on the record. The actual words said by the court or the conduct of the magistrate are not stated or described so as to enable this court objectively to assess their impact. To the contrary the record demonstrates a civilised handling of a difficult accused person who makes unsubstantiated allegations of collusion and bias against the court itself.

#### ***The standard of the reasonable observer***

[37] Having read the record of the proceedings of the court, as variously set out in this judgment for that purpose, the appellate court is able to assess the trial from the eye of the reasonable observer sitting in court and witnessing the proceedings and to determine whether there is evidence of bias, *actual* or supposed, under the objective test of *Shilenje v. R.*, supra, to warrant the invocation of the High Court’s section 81 jurisdiction under the Criminal Procedure Code to transfer the trial to another court on the ground that a fair trial is impossible before the present trial court.

#### ***Considerations of convenience and justice of the case***

[38] Section 81 (1) (d) and (e) of the CPC requires a consideration of the “general convenience of the parties or witnesses” and expediency “for the ends of justice”. The accused is held at Nakuru GK Prison to which the Court in Eldama Ravine is nearer than the Kabarnet Court. The remaining witness in the trial is formal government witness who with exchequer funding can access any court, and the principal witness (PW1), if he were to be recalled, hails from Moyale which is not at convenient proximity of either court. The ends for justice will be served by the expeditious disposal of the criminal trial for the conviction and punishment of the accused, if found guilty, and his acquittal and release, if found not guilty in accordance with the public interest in criminal justice as observed in *Eliphaz Riungu v. Republic*, Misc. Application No. 472 of 1996. For the fair processing of his trial, this court has revised the trial court’s decision to exclude the accused from his trial.

### **CONCLUSION**

#### ***Findings of Law and Fact***

[39] From the perspective of the reasonable objective observer in court, having considered the record of the proceedings as set out above, the court finds as follows:

1. The accused has made unsubstantiated accusations on the police, the prosecution and the court ranging from threats on his life, delay of the trial, collusion between the Court and the police to convict him and allegations of bias on the part of the court on the basis of the ethnicity of the presiding officer.
2. The Court has professionally investigated the allegations and on all occasions summoned the responsible police officers for examination by the Court in the presence of the accused person before making its decision on the allegations.
3. The Court has exercised discretion under Article 50 (2) (f) judicially after considering the relevant facts and circumstances regarding the accused's conduct in and out of Court but, with respect, adopted a rather low threshold for the interference with the fair trial right of attendance of an accused in his trial to amount to an injustice of being tried in absentia despite willingness to participate.
4. The trial court's meticulous maintenance of the record of the trial is to be commended for the ease it affords the appellate court in assessing the proceedings from the standpoint of the reasonable observer in court for the objective determination existence or otherwise of actual or likelihood of bias on the part of the trial court, as alleged.
5. Article 25 of the Constitution provides that the right to a fair trial cannot be limited and the exclusion of an accused from his trial though provided for under Article 50 (2) may, if exclusion is ordered for less than compelling reasons making the proper conduct of the trial impossible, amount to unconstitutional limitation of the right to a fair trial.

### ***Supervisory jurisdiction of the High Court***

[40] The High Court has a constitutional mandate to supervise all subordinate courts in term of Article 165 (6) and (7) of the Constitution as follows:

***“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***

*(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”*

[41] In addition, the Court has a revisionary jurisdiction under section 364 of the Criminal Procedure Code as follows:

#### ***“362. Power of High Court to call for records***

***The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.***

363....

#### ***364. Powers of High Court on revision***

*(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, **or which otherwise comes to its knowledge, the High Court may—***

**(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;**

**(b) in the case of any other order other than an order of acquittal, alter or reverse the order.**

*(c) in proceedings under section 203 or 296(2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.*

*(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:*

*Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.*

*(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.*

*(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.*

*(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.*

*[Act No. 10 of 1970, Sch., Act No. 19 of 2014, s. 20, Act No. 25 of 2015, Sch.]”*

[42] From the totality of the material before the court by way of the evidence and record of proceedings of the trial Court, this Court finds that the allegations of bias against the trial court are within the meaning of **Shilenje v. R**, supra, only **subjective** fears of the accused devoid of **objective** support from the record of evidence and proceedings of the court, and accordingly cannot support a finding under section 81 of the Criminal Procedure Code that “***fair and impartial trial cannot be had***” in the trial criminal court, so as to justify the transfer of the criminal trial from Eldama Ravine Court to the Kabarnet Court as sought by the applicant.

[43] There is merit, however, in the complaint against the exclusion of the accused from his trial in purported exercise of the power of the court under Article 50 (2) (f) of the Constitution, which does not meet the high threshold which must be observed for the exceptional interference with the accused’s fair trial right of being present during his trial.

## **ORDERS**

[44] Accordingly, for the reasons set out above, the prayers in the Notice of Motion herein dated 14<sup>th</sup> March 2017 for stoppage of the criminal proceedings in Eldama Ravine Principal Magistrate’s Court criminal case no. 53 of 2016 before the Hon. R. Yator, SRM, and for the transfer of the case for hearing and determination by the Kabarnet Principal Magistrate’s Court are declined.

[45] The Court, however, grants of its own motion pursuant to section 362 and 364 of the Criminal Procedure Code and in exercise of the supervisory jurisdiction of Article 165 (6) of the Constitution, orders on revision of the order for the exclusion of the accused from his trial. The accused shall be

admitted back into his trial and the proceedings of the Court shall resume from the point it had reached before the order for exclusion of the accused.

[46] The ruling of this court is without prejudice of any applications for recall of witnesses before the trial court, which must be dealt with by that court in its judicial discretion.

Order accordingly.

**DATED AND DELIVERED THIS 16<sup>TH</sup> DAY OF MAY 2017.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Mr. Keboga for the Applicant.

Ms. Macharia for DPP.