REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. CRIMINAL APPLICATION NO. 32 OF 2017

JAMES MUGAMBI KAMAU ……….....………..…..APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION…RESPONDENT

R U L I N G

1. Before me is a Motion on Notice dated 4th May, 2017 brought under Section 81(1), (2) and (3) of the Criminal Procedure Code. It seeks an order that the **Maua Criminal Case No. 1713 of 2013** be transferred from the Maua Court to Meru Court. The grounds upon which the Motion was grounded were set out in the body of the Motion and were that; the Magistrate was showing bias against the Applicant; that the Applicant will not get justice if the case proceeds in the Maua Court and that it was in the interests of justice that the application be allowed.

2. In his Supporting Affidavit sworn on 4th May, 2017, the Applicant stated that he is an accused in the **Maua Criminal Case No. 1713 of 2013** which is still pending before Hon. J. W. Wangángá RM; that he was uncomfortable with the way his case was being handled; that he had requested the trial Magistrate to disqualify himself but the learned magistrate shouted at him and called him stupid and promised to teach him a lesson. The Applicant expressed apprehension that he might be fixed and be jailed even without any evidence. He urged the court to transfer the case from the Maua Court.

3. At the hearing of the application, Mr. Gichuki Learned Counsel for the Applicant reiterated what his client had sworn in his Supporting Affidavit and urged the Court to allow the application. On his part, Mr. Mulochi, Learned Counsel for the state submitted that although the Applicant had made allegations of insult by the trial court in his affidavit, there was no evidence on record to show that the Applicant had made any application before the trial court to recuse itself and was denied as is the practice. He urged the Court to decline the application on the ground that the trial court should first be accorded the opportunity to pronounce itself on the application and give its reasons for the decision before this court can intervene.

4. Section 81(1) of the Criminal Procedure Code provides:-

“1. Whenever it is made to appear to the High Court -

(a) that a fair impartial trial cannot be had in any criminal court subordinate thereto; or

(b) …

(c) …

(d) …

(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 or the 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;

(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.

5. This provision has been a subject of pronouncements. In the case of ***John Brown Shilenje v. The Republic [1980] eKLR*** the court held:-

> ***"I derive much help from commentaries upon section 526 of the Indian Code of Criminal Procedure 1908 made by two eminent writers, both former judges, Sir H. P. Prinsep and Sir John Woodroffe, i.e. the former's*** *Commentary and Notes* ***(14TH Edn) (1906) and the latter's*** *Criminal Procedure in British india* ***(1926).***
>
> ***On page 646 of Prinsep we find:***
>
> ***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.***
>
> ***and that I endorse entirely. It would be thoroughly unfair to such officers were it otherwise. At page 647 we have:***
>
> ***What the court has to consider is not merely the question whether there has been any real bias in the mind of the presiding judge against the accused, but also whether incidents have not happened which, though they may be susceptible of explanation and 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 accused a reasonable apprehension that he may not have a fair and impartial trial. It is not every apprehension of this sort which would be taken into consideration, but when it is of reasonable character, and notwithstanding that there was to be no real bias on the matter, the fact that incidents have taken place calculated to raise such reasonable apprehension ought to be a ground for ordering a transfer.***
>
> ***Again I agree; it is, as it were, the objective approach to the problem supplementing the subjective approach which I just previously set out. Then we have:***
>
> ***Whether such apprehension is reasonable must be determined with reference to the mind of the court rather than to the mind of the accused. The court cannot accept reasonable grounds what the judges know to be insufficient and unreasonable, simply because the litigants were foolish enough to entertain them. To do so would be to encourage a distrust in the integrity and independence of the courts which would amount to a serious evil.***
>
> ***Which also must be so, or so I think. Then it is said:***
>
> ***But although each of several grounds imputing bias may not be sufficient in itself for ordering the transfer of a case to another court, they may taken together form reasonable grounds for***

the accused apprehending that he may not have a fair trial.

which again, as I think, must be so. And, finally, on page 648 we have:

<u>It is the duty of the court to have regard to the importance of securing the confidence of the public generally, or 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.</u>" (Emphasis supplied)

6. In the case of ***<u>Republic v. David Makali & 3 Others [1994] Eklr</u>*** the Court of Appeal observed, inter alia, that:-

"That being the position as I see it, when the Courts in this country are faced with such proceedings as these, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established. It is my view that where any such allegation is made, the Court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their cases before a Court or quasi-judicial tribunal, they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the judge, magistrate or tribunal."

7. In this regard, what comes out of the authorities is that when an issue of disqualification of a judicial officer arises, the court does not have to go to the question whether the subject officer is or will be actually biased. What the court has to do is to examine the facts or evidence before it or what is alleged to show bias and from such facts or evidence draw an inference as any reasonable or fair minded person would do, that the alleged officer is or would be biased ***<u>(see Kimani v. Kimani [1995 -1998] 1 EA 134 and Republic v. Mwalulu & 8 Others [2005] 1 KLR 1)</u>.***

8. In the present case, the record of the trial court shows that **JAMES MUGAMBI KAMAU**, the Applicant was on 14th June, 2013 arraigned before the Chief Magistrates' Court, Maua with five counts one of which was the offence of creating disturbance in a manner likely to cause a breach of the peace contrary to **section 95 of the Penal Code**. It was alleged that on the 21st February, 2012 at Kathiani Location, the Applicant created a disturbance by threatening to cut **BETTY KARIMI** with a *panga*. The Applicant denied the charge and 3 witnesses testified before Hon. C. Kemei Resident Magistrate who was later transferred from that station. On 8th September, 2015, Hon. O. Wanganga took over the case and after complying with the provisions of **section 200 of the Criminal Procedure Code,** the Applicant sought that the case does proceed from where it had reached. The court then ordered that the proceedings be typed and the matter be mentioned on 16th January, 2016 to confirm compliance. That is the end of the record that the Applicant produced before this Court.

9. On the foregoing background, the Applicant swore in his Affidavit dated 4th May, 2017 as follows:-

"1-2 …

3. THAT I am not comfortable in the way the case is being handled as the trial magistrate is heavily biased against me.

4. THAT the last time the case was in court, I requested the trial magistrate to disqualify himself and I gave him past instances.

5. THAT the learned magistrate shouted at me in open court and told me I was stupid and a fool.

6. THAT he promised to teach me a lesson.

7. THAT I am apprehensive that the trial magistrate may fix me and put me behind bars even without any evidence.

8. THAT the case was last listed for hearing on 12/4/2017.

9. THAT unless this honourable (sic) makes an order for transfer of this cause from Maua to Meru courts, I shall suffer irreparable damages."

10. The foregoing are the allegations upon which this Court is being urged to disqualify the Maua Court (Hon. O. Wangángá) and transfer the case to another court in Meru. The Applicant has deposed that the trial court is biased against him and that he is not comfortable with the way the case is being handled; that the last time the case was in court, he had asked the court to disqualify itself based on past instances but the court shouted at him and promised to teach him a lesson.

11. As already stated, the record submitted by the Applicant shows that the last time the matter was in court was on 30th November, 2015. None of the matters set out in the Affidavit in support of the Application are borne by the record produced by the Applicant. Further, the Applicant did not disclose in the said Affidavit what these alleged ***"past instances"*** which he allegedly 'gave' the trial court are that made the court shout at him in open court. All these lacking, I do not think any reasonable person in all probability can be satisfied that there is a likelihood of bias by the trial court. None has been disclosed and none can be inferred from the record submitted to this Court.

12. Mere allegations by a party of alleged or likelihood of bias is not enough. Such allegations must be accompanied by sufficient evidence of bias or likelihood of bias or facts from which bias can be inferred before this court can disqualify a judicial officer under **section 81** aforesaid from proceeding with a matter.

13. In this regard, there being no sufficient reasons advanced, the application is without merit and the same is dismissed.

DATED and DELIVERED at Meru this 29th day of June, 2017.

A. MABEYA

JUDGE

29/06/2017