



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CR. MISC APPLICATION NO. 78 OF 2016

WILLIAM ONWONGA APPLICANT

versus

REPUBLIC..... RESPONDENT

JUDGMENT

1. The applicant William Onwonga has brought a Notice of Motion dated 1st December 2016. He seeks the following prayer:-

- **That an order do issue to transfer Nanyuki Criminal case No. 1358 of 2016 REPUBLIC –V- WILLIAM ONWONGA [from Chief Magistrate Nanyuki] to Chief Magistrate at either Isiolo or Meru for hearing and determination.**

2. That prayer is based on the grounds that the applicant is a practicing advocate under the name of Bwononga & Co. Advocates which firm has clients in Nanyuki, Nyeri, Embu, Muranga, Kerugoya and Karatina; that the applicant was charged with a criminal offence before the Nanyuki Chief Magistrate’s Court being **criminal case No. 1358 of 2016**; that the applicant pleaded not guilty to that charge and was released on bail; that having the case heard at Nanyuki Chief Magistrate’s court is likely to occasion the applicant prejudice, embarrassment and humiliation before his clients; and that the complainant had made a complaint over the same matter before the Advocates Disciplinary Tribunal which Tribunal dismissed the complaint and acquitted the applicant.

3. **Detective Constable David Mayaka** the investigating officers in the Criminal Case No. 1358 of 2016 before Nanyuki Chief Magistrate’s court by his replying affidavit opposed the application for transfer on the grounds that the complainant’s case was due for consolidation with another **Criminal Case number 1179 of 2016**; that the complainant and his witnesses all reside at Nyeri and Nyahururu; and that the complainant was of the view that any transfer of the case as sought will lead to delay in the conclusion of the case.

4. The applicant in his further affidavit deponed, and which deposition was confirmed by the respondent, that his case had been ordered to be tried separately and that the consolidation referred to by the investigating officer would not occur. Further the applicant deponed that the complainant and his witnesses would be refunded travelling expenses when they attended court and that no further expense will be borne by them if the case was transferred.

ANALYSIS AND DETERMINATION

5. The High Court’s power to transfer a criminal case is donated by **section 81** of the **Criminal Procedure Code Cap 75**. The relevant subsection of that section 81 is sub-section **(e)** which provides

that the High Court may order the transfer of a criminal case if “**such an order is expedient for the end of justice.**” The applicant has stated in his application and it was not denied by the respondent, that he practices law within the vicinity of Nanyuki Law Courts where his criminal trial is pending. In the case **JOSEPH MUTUA KLUNGU V DANIEL MUSYOKI MUSIU & 4 OTHERS [2012]eKLR** the court considered the application of **section 81** and stated:-

“Indeed, this court, as per the provisions of Section 81 of the Criminal Procedure Code (Cap 75) has wide discretion in transferring criminal cases from one subordinate court to another, and also to itself. However, that discretion, being judicial discretion has to be exercised judicially. The court has to act on tangible reasons that clearly demonstrate that a fair trial will not be had if the case is not transferred to another court. In coming to this court, the applicant has levelled serious allegations. the burden was on him to demonstrate the particular facts that would persuade the court to exercise its discretion. This court cannot act on mere allegations, however alarming those allegations might be.”

6. The court is of the view that the applicant has indeed demonstrated facts that persuade this court that the best interest of justice would be served by acceding to the application for transfer. To grant the applicant his prayer would serve the principle of fair trial under Article 50 of the constitution which provides that an accused person has a right to be presumed innocent. If the applicant was seen defending his criminal case by his client and potential client they more than likely would presume that he is guilty of a criminal offence. That would breach his constitution right. This court is obligated to protect the constitutional right of the applicant.

7. Accordingly the order of this court is that **Criminal Case No. 1358 of 2016 REPUBLIC –V- WILLIAM ONWONG’A before Nanyuki Chief Magistrate’s Court is hereby transferred to Isiolo Chief Magistrate’s Court for trial. The case shall be mentioned before Isiolo Chief Magistrate’s court on 7th July 2017.**

DATED AND DELIVERED at NANYUKI THIS 20TH DAY OF JUNE 2017.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue/Mariastella

Applicant: William Onwonga

For applicant :

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE