



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

MISC CRIMINAL APPLICATION NO. 13 OF 2017

ZAKAYO MUGAMBI MATUMA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **ZAKAYO MUGAMBI MUTUMA** the applicant herein has moved this court vide a Notice of Motion dated 15th June, 2017 brought under **Article 50(a)** of the **Constitution of Kenya, 2010** and **Sections 81(a)(b) and 362** of the **Criminal Procedure Code** for the following orders namely:-

a. That this court be pleased to revise/review the orders issued by Hon.Sudi vide sexual offence case No. 32 of 2015.

b. That this Honourable Court be pleased to call for sexual offence case No.11 of 2015 to this court for transfer to another court with competent jurisdiction to hear and dispose it.

2.The grounds upon which this application for review has been made are listed as follows namely:-

(i) That the learned magistrate Hon. Sudi is handling sexual offence No.11 of 2015.

(ii) That the facts of the case and witness in Sexual Offence No. 11 of 2015 and Sexual Offence No.5 of 2015 are the same.

(iii) That the evidence to be adduced in Sexual Offence No. 11 of 2015 is similar to the evidence in Sexual Offence No. 5 of 2015.

(iv) That it is likely that the magistrate is already aware of the evidence to be brought forward by the prosecution since she heard witnesses in Sexual Offence No. 5 of 2015.

(v) That the trial court is likely to be bias and partial against the applicant in order to render a similar verdict as in Sexual Offence No. 5 of 2015.

(vi) That giving a contrary verdict is highly unlikely since the trial magistrate will appear as if it is reviewing her own judgment.

(vii) That biasness is likely to occur and that it is not for the trial court to determine whether

biasness will occur but that it is the perception and opinion of right thinking members of the public that should be considered.

(viii) That failure to prevent a perception of biasness amongst members of public erodes public confidence in the judiciary as citizens will think that innocent people are being incarcerated.

3.This court exercised its discretion pursuant to the provisions of **Section 365** of the **Criminal Procedure Code** and invited both the Applicant and the Respondent to make their respective representations regarding this application. The applicant on his part through his counsel submitted that the trial court is unlikely to reach any different verdict in the case facing him from the verdict reached in Sexual Offence case No.5 of 2015. The Applicant has further contended mere apprehension of a conviction in the case facing him should be sufficient cause to transfer the case to an impartial and a fair court cited the provisions of **Article 50** of the Constitution stating that he has a right to a fair trial.

4.The Respondent on its part through its learned counsel Mr. Machirah opposed the Application contending that no sufficient grounds upon which this court can act has been laid in this application. The Respondent has further submitted that the Applicant has not demonstrated any bias or partiality in regard to the trial court to warrant the orders being sought in this application. It is contended that Sexual Offence No. 5 of 2015 is different from Sexual Offence No. 11 of 2015 and that the Applicant has not shown how he will be affected arguing that in any criminal trial the verdict is either conviction or acquittal and an Accused person cannot be expected to foretell the results of his trial.

5.I have considered the application and the grounds upon which it has been made. This is an application for both a review and a transfer of criminal case pending in one court to another. But perhaps I should first correct an anomaly in the description of the case pending before Hon. Sudi Senior Resident Magistrate Chuka. Upon calling the lower court file and perusing the same, this court has observed that the case involving the applicant herein was first registered as a normal criminal case and given the number 184/15. Thereafter a register relating to sexual offences cases were opened and the case was first given number 11/15, before the number was corrected due to an anomaly in the registry and given the current number Sexual Offence No. 32 of 2015. The case that this application and this ruling relates to is Sexual Offence No. 32 of 2015.

6.The Application before this court has invoked this court's power of revision donated by **Section 362** of the **Criminal Procedure Code**. The power of this court to revise orders emanating from criminal proceedings in the lower court is limited to finding out about the correctness, legality or propriety of any finding, sentence or order passed and the regularity of the proceedings. As observed above I have called for the original files in both Sexual Offence No. 32 of 2015 and the finalized Sexual Offence No. 5 of 2015. This court has noted that both the Accused person in Sexual Offence case No.5 of 2015 and the victim are different from sexual offence No.32 of 2015. In Sexual Offence No.5 of 2015, the Accused person is known as **JAMES GITONGA MICHENI** and the victim is described as **MERCY KANGAI**, a girl aged 13 years old. The offence in that case occurred on 13th January, 2015. In the present instance (Sexual Offence 32/15) the particulars of the offence as per the charge sheet presented to the trial court shows that the alleged offence took place on 4th January, 2015 and the victim of the offence is described as **AGNES KANGAI** a girl then aged 14 years old. I also noted from the charge sheet that four witnesses namely **AGNES KANGAI, PHARESMUCHIRA, MARTIN NYAGA** and investigating officer **MWENDA** are common witnesses in both cases but two witnesses are different in both cases. It is therefore incorrect for the Applicant to state that all the witnesses in both cases are the same but even in situations or cases where witnesses are common, an applicant must demonstrate basis for bias on the part of the trial magistrate. It would be presumptuous for an Applicant to conclude that a trial court would be biased against him just because the witnesses in another case are the same witnesses in a case facing him. The provisions of **Section 81(1)** of the **Criminal Procedure Code** which the Applicant herein has invoked provides as follows:-

"Whenever it is made to appear to the High Court that a fair and impartial trial cannot be had in any criminal court Subordinate thereto..... it may order that..... 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."

This court can also in its exercise of its supervisory jurisdiction under **Article 165(6)** order for transfer of a criminal trial pending in one subordinate court to another to ensure fair administration of justice. The above provisions in my view show that this court cannot just order for a transfer of a criminal case pending before one subordinate court to the other. There has to be a substantial basis for it and the burden lies on whoever alleges bias or unfair trial. This court's position is persuaded in the decision of **Hon. Ochieng J.** in the case of **KAMANDE & 3 OTHERS -VS- REPUBLIC [2014] EKLK** where the court made the following observation;

"When giving consideration to an application for the transfer of a case, the court will assess whether, the applicant's apprehension was reasonable and founded on sufficient material. The reason for laying emphasis on those factors is that the court has a duty to encourage trust in the integrity and independence of the judiciary. Therefore, allegations which may be directed at judicial officers alleging bias and lack of fairness must not therefore be accepted without there being substantive evidence to back them. If a court was too quick to accept allegations of bias directed against its officers without first demanding proper substantiation, it would erode the very foundation upon which the judiciary was founded."

7. Going by the above position this court has noted that in this application the applicant is asking for a transfer of a case that has been pending in the subordinate court for two years now. The trial magistrate now conducting these proceedings took over the case which was part-heard on 18th July 2016 and the applicant asked that court when taking directions under **Section 200** of the **Criminal Procedure Code** to proceed from where the other magistrate had reached before her transfer. It is to be noted that at that time, Sexual Offence No. 5 of 2015 had proceeded in a similar manner before the same court albeit on an earlier date which was 30th June, 2016. Both cases were proceeding in the same court but on different dates. The applicant herein was duly represented by the same learned counsel appearing in this application and the fact that he did not raise any issue about the fair trial and impartiality of that court to handle the matter in my view shows that the issue of impartiality and a fair trial were a non issue at the time. The question is why has it become an issue now one year down the line and facts have not changed? The prosecution did not alter the charge facing the applicant or alter the list of witnesses. I have also noted that the applicant herein has on numerous occasions caused the adjournment of the trial in the subordinate court and this brings into question the real reasons behind this application as it should be lost that both the provisions of **Section 4** of the Children's Act and **Article 53** of the **Constitution of Kenya 2010** provides that in cases involving children the primary consideration is the best interest of the child. This court finds that it is in the best interest of the any child involved in the Sexual Offence cases for the trial is conducted and finalised expeditiously. That right is also enshrined under **Article 50(2)** of the Constitution that provides that an Accused person has a right to a fair trial that includes **"to have a trial begin and conclude without unreasonable delay."** This court finds that part of the reasons why the trial of the applicant in the subordinate court has not concluded is his unpreparedness to proceed with the hearing even on occasions when the prosecution availed witnesses. That notwithstanding, this court finds that contrary to the alleged bias and partiality, the trial court has been quite accommodative to the applicant. I do not therefore find any basis for the applicant to feel that the same trial court would all of a sudden lose its impartiality and fairness in trying him for the offence he is charged with. The trial court has treated the applicant fairly so far.

8. This court notes that the applicant had made a similar application before the same trial court on 5th April, 2017 after that court had given a court adjournment to the defence on 9th February, 2017. The trial court made its ruling declining the defence request and hence this application. This in my view raises two legal issues:-

- a. whether the order by the trial court declining to disqualify itself can be a subject of review.***
- b. or whether the same should be subject to an appeal.***

As I have observed above, this court's powers to review an order is limited to the cited provisions of

Section 362 of the **Criminal Procedure Code**. The applicant has not challenged the trial court's order on the basis of its legality, propriety correctness or its regularity. No ground has been cited by the applicant on any of those grounds. The applicant may have felt aggrieved by the decision of the trial court and he is entitled to feel dissatisfied but if he was, he should have appealed if he thought that the reasons advanced for transfer were merited. The provisions of **Section 364 (5)** provides as follows:-

"When an appeal lies from a finding sentence or order, and no appeal is brought, no proceedings by way of revision shall be entertained at the insistence of the party who would have appealed."

The above provision in my view brings this matter to a rest. The applicant ought to have appealed against the decision of the trial court refusal to transfer the case rather than apply for a revision.

9.It is also important to note that an applicant moving the court **under Section 81** of **Criminal Procedure Code** can only do so by invoking this court's appellate or supervisory powers under the law but the revisionary powers can only be exercised under **Section 362** of the **Criminal Procedure Code**. The application before me has invoked both the appellate and revisionary powers of this court which clearly renders the application incompetent by a dint of **Section 364 (5)** of the **Criminal Procedure Code**.

The upshot of this is that this court finds no merit in the Notice of Motion dated 15th June, 2017. The application is also incompetent as observed above but since the same can only suffer one fate the same is dismissed. This court notes that the case against the applicant has now been pending for two years and it will be in the interest of justice that the same be expedited and brought to a close.

Dated and delivered at Chuka this 27th day of July, 2017.

R. K. LIMO

JUDGE

27/7/2017

Ruling signed, dated and delivered in the present of Machirah for state and the applicant.

R.K. LIMO

JUDGE

27/7/2017