



**REPUBLIC OF KENYA**

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

**CRIMINAL MISC. APPL. NO. 125 OF 2016**

**JOSHUA MUSYOKI .....APPLICANT**

***VERSUS***

**REPUBLIC .....RESPONDENT**

**RULING OF THE COURT**

1. The Applicant herein **Joshua Musyoki** has filed an Application dated 24/10/2016 seeking for an order that **Criminal Cases Numbers 735 of 2015 and 61 of 2016 at Kangundo Law Courts** be transferred to any other court either in Machakos, Kibera or Makadara Law Courts for hearing and final determination.

2. The Application is based on the following grounds namely:-

(a) That the trial magistrate is likely to favour the complainant in a manner likely to interfere with the fair trial and discriminate the Applicant from getting justice.

(b) That the trial magistrate ordered for pre trial disclosures at the dock and giving Applicant only 20 minutes to study and start cross- examination.

(c) That the prosecution did not indicate the evidence they intend to rely upon prior to commencing the trial.

(d) That the trial magistrate denied the Applicant a right to make an Application regarding his lost property.

(e) That the trial magistrate never informed him that certain witness had been omitted from the list of witnesses.

3. The Respondent did not file a replying affidavit to the Applicant's Application. However parties herein agreed to canvass the Application by way of written submissions. It was submitted by the Applicant that he was rushed to proceed with the hearing yet he was not ready. The Applicant further submitted that his request to pursue his lost properties after the two cases were consolidated was not listened to by the trial magistrate and therefore the Applicant believes that the trial magistrate is not likely to give him the necessary justice.

It was submitted for the Respondent that the Applicant had indeed indicated his willingness to proceed with the case as borne out of the proceedings of 21/07/2016 and that he cross – examined the witnesses. It was further submitted that the record does not reveal whether Applicant made any request over his alleged lost items. It was finally submitted that the trial court should be given time to conclude the matter and hence the Application should be dismissed for being frivolous, vexatious and otherwise an abused of

the court process meant to delay the course of justice.

4. I have considered the Applicant's Application and the submissions presented. The issue for determination is whether the Applicant has presented sufficient grounds to justify an order of transfer of his case at Kangundo law courts to another court. I have perused the record of the proceedings and note that the Applicants co-accused included his wife and son who were later discharged after the prosecution withdrew charges against them. The record also reveals that on the 21/07/2016 the Applicant opposed an application for adjournment by prosecution and impressed upon the court to grant them a last adjournment and that on the 22/08/2016 the case proceeded and the Applicant vigorously cross-examined two witnesses for the prosecution. At no time did the Applicant indicate that he was not ready to proceed with the hearing and there is nowhere in the proceedings that he complained of lack of witness statements or that he had been ambushed to proceed with the case. The entire record also does not show that the Applicant ever raised any issue to do with his lost items. The Applicant is still at liberty to raise the issue of loss of items with the trial court seized with this matter.

It is noted that the Applicant did not seek to recall any of the witnesses if he felt that he needed them to come back for further cross-examination. The record does not indicate that such a request was made and refused by the trial court. He can still make the request.

Finally the Applicant has not presented any tangible evidence to show that the trial court has been biased towards him or that his rights to a fair trial under Article 50 of the Constitution have been infringed or violated. In the absence of any tangible evidence of bias by the trial court towards the Applicant, I find the request for transfer of the case to another court other than Kangundo law courts is not merited. The transfer sought would further delay the finalization of the case which is not in the interests of both Applicant and the Respondent. It is fair and just to let the trial court at Kangundo conclude the matter.

5. In the result it is the finding of this court that the Applicant's Application dated 24/10/2016 lacks merit. The same is ordered dismissed. The Applicant is directed to proceed with his case at Kangundo Law Courts as earlier on scheduled.

It is so ordered.

Dated and delivered at **Machakos** this **20<sup>th</sup>** day of **December, 2017**.

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

Joseph Musyoki for the Applicant

Machogu - for the Respondent

Kituku - Court Assistant