



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. CR. APPL. NO. 1 OF 2016

SIMON WACHIRA UME.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. **SIMON WACHIRA UME** has brought a Notice of Motion dated 4th February, 2016 for transfer of a case (Kerugoya C.M.CR.C. No. 712/15) from Kerugoya Chief Magistrate's Court to another court outside Kirinyaga County.
2. The grounds upon which the application was brought are as follows:
 - i. *That the applicant fears that he will not be accorded a fair hearing as one of the witnesses to the case is an advocate named Jane Wangechi Munene based in Kirinyaga where she practices and that due to her influence, she is likely to influence the outcome of the case against him.*
 - ii. *That the trial court has shown discrimination even before the case starts.*
 - iii. *That the applicant does not understand why his case (Kerugoya C.M. CR. Case No. 105/15) was consolidated with Kerugoya C.M. Cr. No. 490/13 and now Cr. Case No. 712/15.*
 - iv. *That the applicant has been charged with the same offence as those charged in Kerugoya C.M. Cr. Case No. 490/13 with the same witnesses, some of whom have already testified and that the trial court has a prior knowledge of the case before it starts.*
3. The applicant has also sworn an affidavit which was sworn on 4th February, 2016 in support of the above grounds.
4. The State through the Office of the Director of Public Prosecutions has opposed the application for transfer of the case to another court. In a replying affidavit, sworn on 11th February, 2016, **Mr. Eusebius P. O. Omayo** the learned Principal Prosecuting counsel has responded that Wangechi Munene is just a witness in the robbery case against the applicant and one Francis Muriithi Kithaka and that she has no influence on judicial officers working here at Kerugoya. The State further asserted that there was no justifiable reason to transfer the case to another county saying that if the applicant was uncomfortable with court one (Chief Magistrate – Kerugoya), hearing the cases the one case can still be handled by another magistrate's court here in Kerugoya as they have jurisdiction.
5. This Court has considered the application, the grounds upon which it is made and the response by the State. This Court is given power to transfer a case or change the venue of a trial under *Section 81* of the Criminal procedure Code Cap. 75 Laws of Kenya which provides as follows:

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 lend 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 to trial to itself.”*
6. This Court finds that the grounds upon which this application has been brought does not meet or satisfy the requirements enumerated by the above quoted section. This Court does not see how a witness whether an advocate practicing within jurisdiction of trial court or not can influence a judicial officer just because the witness is an advocate. The applicant has not demonstrated what special circumstances exist that can subject him to unfair trial to warrant transfer of a case from one court to another. It is not enough just to allege that one is unlikely to have a fair trial. A fair trial is a constitutional right to an accused person and courts of law should jealously protect it. This Court cannot hesitate to invoke its powers if it does appear that an accused person's right has been breached or likely to be violated.
 7. I have also considered the applicant's complaint about consolidation of his case and another related matter. Before I address this issue I have seen from the proceedings in **Kerugoya C.M. Cr. Case No. 712/15** that the applicant had applied before the trial court to be tried separately with Francis Muriithi Kithaka – a co-accused in the case. The trial court heard the application and made a decision based on the law and facts. The decision of the trial court was not challenged by either of accused persons and that is why the case is currently proceeding against the applicant and the said co-accused jointly in **Criminal Case No. 712/15**.
 8. The applicant mentioned a criminal case in Kerugoya **Chief Magistrate's Criminal Case No. 490/13** and opined that that case is related to his case (Cr. Case No. 712/15 and that it was unfair for court one to handle his case after having heard witnesses in Kerugoya **Chief Magistrate's Criminal Case No. 490/13**. This Court called for the file in Kerugoya Chief Magistrate's Court **Criminal Case No. 490/13** and noted that the case is actually related with **Criminal Case No. 712/15** as they both relate to the same offence. The difference is that the applicant herein and his co-accused Francis Muriithi Kithaka were arrested much later after the others in **Criminal Case No. 490/13** had been arrested and case proceeded. It is therefore true that the case has proceeded in **Criminal case No. 490/13** where witnesses have testified.
 9. This Court finds that it is in the interest of justice to have the case facing the applicant (Criminal Case No. 712/15) to be tried in a different court within Kerugoya for the interest of justice. It is convenient and fair to have a different court handle the case because of the inconvenience of consolidating the two cases and starting all over again afresh before the same court. To do so will expose the other accused persons in **Criminal case No. 490/13** to unfair and unnecessary delays which is against the interest of justice and their rights under **Article 50 (e) of the Constitution**.

In the light of the above this Court finds no merit in the application dated 4th February, 2015. The same is dismissed. This Court nonetheless directs that the applicant and co-accused in Kerugoya Chief Magistrate's Court **Criminal Case No. 712/15** be tried before another court with competent jurisdiction to try the case within Kerugoya law courts. The matter shall be mentioned before Court 1 on 8th March, 2016 for relocation and fixing of a suitable hearing date. That is the ruling of this

Court and it is so ordered.

Dated and delivered at Kerugoya this 24th day of February, 2016.

R. K. LIMO

JUDGE

24.2.2016

Before Hon. Justice R. Limo J.,

State Counsel Sitati

Court Assistant Willy Mwangi

Applicant present

Interpretation English-Kikuyu

Sitati for State present

Simon Wachira Ume present in person.

COURT: Ruling signed, dated and delivered in the open court in presence of the Respondent and the applicant in person.

R. K. LIMO

JUDGE