



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**MISC CRIMINAL CASE NO.7 OF 2015**

**KEN MURIUKI.....APPLICANT**

**-VS-**

**REPUBLIC..... RESPONDENT**

**RULING**

By a Notice of Motion Application brought pursuant to the provisions of Article 50 (a) of the Constitution of Kenya 2010, and section 81 (a) and (e) (ii) of the Criminal Procedure Code CAP 75 of the Laws of Kenya, The Office of the Director of Public Prosecutions has on behalf of the Complainant one, Ken Muriuki sought the following order:

- 1. THAT Criminal case No. 749 of 2014 be transferred from the Magistrate's Courts in Meru to any other court of equal jurisdiction.**

The gist of the application is that the Applicant was assaulted by employees of Blend Bar and Restaurant, a popular entertainment spot in Makutano area of Meru, usually frequented by some court officers and that the accused persons have been seen milling around the court precincts particularly in the subordinate court registries conversing in low tones with one of the subordinate staff on how to fix the matter and obtain a favourable outcome of the case.

It was contended further for the applicant that he is apprehensive that he will not be accorded a fair and impartial hearing if this matter is heard within the jurisdiction of Meru Law Courts and that the applicant practices law mostly in Meru Law Courts and interacts with officers of the court on a day to day basis.

The said application is supported by a supporting affidavit sworn by the complainant Ken Muriuki in which he reiterates the above stated grounds.

The application was opposed via grounds of opposition filed by the respondents on 18<sup>th</sup> March 2015. It was contended that the application is bad in law, incurably defective and a gross abuse of the criminal process and that the applicant (if any) has not demonstrated at all how his right to a fair and impartial hearing has been infringed or is likely to be infringed; that the application is speculative, pre-emptive, opaque, and is unsubstantiated and premised on conjectures.

When the application came up for hearing on 24<sup>th</sup> March 2015, Mr. Mungai, Learned Counsel on behalf of the applicant, intimated to court that he had consulted and that the position was that the Office of the Director of Public Prosecutions was making the application on behalf of the complainant. On the other

hand, Mr. Mutunga counsel for the respondents intimated to court that he was relying on the filed grounds of opposition.

I have carefully considered the application and submissions relied on by the parties. The instant application is said to be brought pursuant to the provisions of section 81(I) (a), (e) (ii) of the Criminal Procedure Code CAP 75 of the Laws of Kenya, which the same provide as follows:

**“81 (1) wherever it is made to appear to the High Court-**

- a. *that a fair and impartial trial cannot be held in any criminal court subordinate thereto; or*
- b. ...
- c. ...
- d. ...
- e. *that such order is expedient for the ends of justice or is required by any provision of this code,*

i. *it may order*

*ii. that a particular criminal case or class of cases transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction.*

I have considered some cases where such an application was made and what the courts considered. In the case of **KINYATTI VS REPUBLIC CRIMINAL APPEAL NO. 60 OF 1983 (KLR 562)** the Court of Appeal held inter alia that ***in deciding whether or not to transfer a case from one court to another, the test was whether the appellant had made out a clear case by discharging on the balance of probabilities the burden of showing that the apprehension in his mind that he may not have a fair and impartial trial is of a reasonable character..”***

**In Shilenje V The Republic [1980] KLR 132.** Trevelyan J. cited with approval from the commentaries by Sir H.T. Prinsep and Sir John Woodroffe in ***“Commentary and Notes”*** (14th Edition) (1906) and ***“Criminal Procedure in British India”*** (1926), respectively. It reads:

***“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.”***

In this case, the request is not to transfer the case from one specific officer but several officers based at Meru Court. There is no doubt that the complainant in the trial court is a lawyer who practices before these courts. It is also not denied by the Respondent, that the judicial officers from Meru frequent the Respondent’s place of business and are therefore the clients of the Respondents. I ascribe to the holding in English case of **R. V. Sussex Justices Exp Mc carthy (1924) LLB 256** where the court said:

***“Justice should not only be done but should manifestly and undoubtedly be seen to be done”***

The court should not be allowed to conduct the said case in circumstances that may suggest bias, prejudice or favoritism on the part of any judicial officer because that would go to undermine the public respect and confidence in the judicial system. In **Tumaini V. Republic (1972) EA 441** the court stated that:

***“In considering the possibility of bias it is not the mind of the judge which is considered but the impression given to reasonable persons”:***

If the public or right thinking members of the public were to perceive that the magistrates at Meru are likely to be biased then the court should ease itself from the conduct of such a case.

In a more recent case namely, **KAMANDE & 3 OTHERS V REPUBLIC Eklr (2014) NAIROBI CRIMINAL APPLICATION NO. 831 OF 2012 Ochieng J** when faced with a similar application for transfer stated thus:

***“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 these 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. At the same time, the court must balance this consideration with the need to ensure that justice is not only done, but also seen to be done.***

I would in my view, find that if this case were to be heard before the magistrates currently based at Meru Law Courts then the ordinary members of public would believe that either one of the parties may not get justice. I must state that the applicant’s allegation that he has seen the Respondents talking to the court staff in a bid to influence them is not evidence that the staff are compromised. Registry staff cannot influence the decision of a court. I believe the court has independent and competent magistrates who can hear the case. However, due to the reasons I have considered above, that it matters how a

reasonable man looks at it, I allow the application and order that CMCR 749/2012 be and is hereby transferred to Isiolo Chief Magistrate’s Court for hearing and determination Cr. Case No. 749/2012 be mentioned at Isiolo Court on 12/5/2015 for directions and further orders.

It is so ordered.

**DATED AT MERU THIS 27<sup>th</sup> DAY OF APRIL 2015**

**R. P .V. WENDOH**

**JUDGE**

**Mr. Musyoka for Applicant**

**Mr. Mutunga for Respondent**

**Jane/Faith Court Assistant**