



REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

MISC. CRIMINAL APPLICATION NO. 3 OF 2015

BETWEEN

DARLTON BARAZA NYAMWANGAACCUSED/APPLICANT

AND

REPUBLICRESPONDENT

(Being an application for transfer of Criminal Case No. 227 of 2013 at the Chief Magistrate's Court at Migori before Hon. E.M.Nyagah, PM,)

RULING

1. The accused has moved this court to transfer *Migori SPMCC Criminal Case No. 227 of 2013* being heard before Hon. E. M. Nyagah, SRM to another magistrate within Migori Law Courts. The accused is charged with three counts of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. He is facing a retrial after his original conviction in *Migori SPMCC Criminal Case No. 216 of 2007* was quashed by the Court of Appeal.
2. The grounds of the application as set out in the application filed on 26th March 2015 as follows;
 - a. The accused's fundamental rights under **Article 48(1)(f)** of the Constitution were violated and that the learned magistrate failed to consider the same.
 - b. That the accused has been forced to proceed with the case in the absence of the complainant and exhibits in the case.
 - c. That the learned magistrate has threatened the accused that the matter will proceed whether the accused is present or not.
 - d. That his application to the State counsel at Migori on 22nd October 2014 was rejected as he was informed that the officer did not have the power or authority to transfer the case to another court.
 - e. That despite the matter coming up for hearing at least 10 times, the complainant and witnesses have not attended court and the court had not taken action to determine the case considering it is a retrial.
3. In order to appreciate the applicant's application, I have reviewed the proceedings and I find as follows. The accused was arraigned before the court on 30th May 2013 whereupon he denied the charges and was granted bail on terms. The court also directed that he should be given witness statements. On 12th June 2013 he brought he filed an application alleging that his constitutional rights had been violated when he was detained for a period 13 days before being charged. Since the prosecution required time to respond to it, the matter was adjourned and on 24th June 2013, the

matter was reserved for ruling on 1st July 2013. In his ruling of the learned magistrate held that the detention of the accused did not violate his fundamental rights as he remained in custody merely for the purpose of ensuring that he was brought to the court to plead after the Court of Appeal had ordered a re-trial.

4. Thereafter the matter was fixed for hearing on various dates. On 15th July 2013, the trial magistrate was not sitting while on 12th August 2013, the trial magistrate was attending vetting. On 25th September 2013, the prosecutor was attending to a sick child. On 14th October 2013, 30th October 2013 and 27th November 2013, the trial magistrate was away on official duties. On 11th December 2013, the learned magistrate was on his annual leave. On 8th January 2014, the matter could not proceed as the witnesses were not available. When the matter came up for hearing on 3rd February 2014 and the magistrate was not sitting, the accused complained that the matter was taking too long.
5. On the next hearing date, 17th February 2014, the accused raised an objection to the proceedings on the ground that he had not been supplied with witness statements. The matter was adjourned after the court directed that he be supplied with the statements. At the next hearing on 26th March 2014, the accused objected to the hearing on the ground that he had not been supplied with the statements. The matter was therefore adjourned to 28th August 2014.
6. On 28th August 2014, the prosecution was ready to proceed with three witnesses but the accused sought to be supplied with a copy of the inventory list and the investigation diary. The matter again adjourned to 23rd June 2014. On that day the accused applied for an adjournment on the ground that a list of exhibits had not been supplied. Although the prosecution had three witnesses present, the matter was adjourned to 22nd September 2014.
7. On 22nd September 2014, two witnesses were heard and the matter adjourned to 15th October 2014. On 15th October 2014, the accused drew the court's attention to the fact that he had filed a written application which he wished the court to consider. The court then reserved its ruling for delivery on 8th October 2014.
8. The application for consideration was contained in a handwritten letter dated 6th October 2014 and it raised the following issues; that his rights under **Article 49(1)(f)** of the Constitution had been violated, that since 30th May 2013 to April 2014, that he had been praying for witness statements which had been delayed, that he had been forced to proceed with the hearing without the complainant and exhibits on 22nd September 2014, that since 30th May 2013 to April 2014, the matter had come up for hearing at least 10 times and has been adjourned without cogent reasons, that he had asked for the prosecution exhibits but these had not been provided and that the case was an old case which had been delayed. The accused requested the learned magistrate to disqualify himself.
9. By a ruling dated 8th October 2014, the learned magistrate dismissed the application. He ruled the claim for constitutional violations had already been dealt with and dismissed. He noted that the prosecution had supplied all the witness statements that had been requested and that the accused should not pre-empt the prosecution witnesses but wait for to testify. He found that accused's application, amongst others, was contributing to delay of the matter. He finally held that there was no basis for him to disqualify himself from hearing the matter. Thereafter, the matter could not proceed as the accused lodged this application in the High Court.
10. The accused's application calls upon this court to exercise its powers under **section 81** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** which empowers the High Court to transfer a criminal case from one subordinate court to another or to itself. It states as follows;

81(1) 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 tend 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 for trial to itself.

11. From the tenor of the application, it appears that the accused feels that he may not receive a fair and just trial in terms of **section 81(1)(a)** of the *Code*. In *Maina Kinyatti v Republic* [1984]eKLR, the Court of Appeal considered the test to be applied in such cases and stated that, “Where the apprehension in the mind of the accused that he may not have a fair and impartial trial is of a reasonable character, there, notwithstanding that there may be no real bias in the matter, the facts of incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer.” The Court of Appeal further observed that it is the reasonableness of the accused person’s apprehension that is relevant and if the accused shows that his apprehension is reasonable then he has set out a clear case.

12. The same test was applied in *John Brown Shilenje v Republic Nairobi Cr. Appeal No. 180 of 1980* by Trevelyan J., who stated that the test of that of, “Reasonable apprehension in the applicants or any right thinking person’s mind that a fair trial might not be heard before the magistrate. Mere allegations will not suffice; there must be reasonable grounds for allegations.”

13. I have looked at the grounds advanced by the accused vis-à-vis the record of proceedings and I find that they lack merit. The adjournments in the matter had been occasioned for justifiable reasons. Any delay in the proceedings was justified by the fact that the learned magistrate was not available on some dates or that matter was adjourned to enable the accused obtain the statements, list of exhibits, inventory and investigation diary which the learned magistrate directed should be given to him. The hearing, though, has commenced with two witnesses having testified. The accused had been able to cross-examine the witnesses and has not raised any issue in the court below about ability to defend himself. On the whole, I do not find any unreasonable delay in the matter.

14. I also not apprehend anything on the record of proceedings that would call into question the manner in which the learned magistrate handled the case. Applying the test I have outlined above, I find that complaints are not reasonable and no reasonable person would conclude that the accused would not have a fair trial in the circumstances.

15. Before I conclude, I wish to deal with the issue of violation of the accused’s fundamental rights and freedoms. In *Julius Kamau Mbugua v Republic Criminal Appeal No. 50 of 2008* [2010]eKLR the Court of Appeal held that pre-trial violations including violation of **Article 49 (1)(f)** of the Constitution do not have any bearing on the innocence or guilt of the accused and may be vindicated by filing a separate petition in the High Court under **Article 22** of the Constitution. In other words, the learned magistrate dealt with the issue properly on 1st July 2013 and he cannot be expected to deal with it any further.

16.I therefore reject the accused's application to transfer the case to any other court. I direct that the court deals with the matter expeditiously bearing in mind that it is a re-trial.

DATED and DELIVERED at MIGORI this 17th day of April 2015

D.S. MAJANJA

JUDGE

Applicant in person.

Ms Owenga, Principal Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.